IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,
Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BARRY IVAN SLOTNICK
Attorney for Petitioner
233 Broadway
New York, New York 10007
(212) WO 4-3200

JAY L.T. BREAKSTONE
of Counsel

DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Table of Cases *Page*

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

REVEREND LOUIS R. GIGANTE,

Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner Reverend Louis R. Gigante respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on May 8, 1979.

OPINION BELOW

The opinion of the Court of Appeals, is reported at 47 N.Y.2d 160, 417 N.Y.S.2d 226 (1979) and appears in the Appendix hereto. The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 65 A.D.2d 585, 407 NYS 2d 163 (First Dept., 1978),

and appears in the Appendix as well. There was no opinion, per se, rendered by the Supreme Court of the State of New York, Extraordinary, Special and Trial Term, held in and for the County of New York. The Mandate of Commitment of the court adjudging the petitioner in criminal contempt may be found at page 13a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 8, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether a duly ordained clergyman is free from unnecessary questioning by a state grand jury revolving about the practice of his ministry under the Free Exercise Clause of the First Amendment to the Constitution of the United States.

2. Whether the Court's ruling in *Branzburg v. Hayes,* 408 U.S. 665 (1972) was intended to afford state grand juries the power to compel a clergyman to testify needlessly regarding protected areas of communication and activity.

3. Whether it was the intention of the Court in *Branzburg v. Hayes, supra,* to extend that opinion to the portion of the First Amendment protecting Freedom of Religion.

4. Whether, the grand jury's investigative power, on its face alone, outweighs an individual's right to practice his religion freely.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Civil Practice Law and Rules of the State of New York, Section 4505:

Confidential communication to clergy privileged.

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.

STATEMENT OF THE CASE

Petitioner, a duly ordained Roman Catholic priest since 1959, was subpoenaed on July 20, 1977, by respondent, to appear before an Extraordinary, Special and Trial Term grand jury held in and for the County of New York. As part of his ministry he had undertaken to visit prisons, minister to prisoners, visit their families and talk to prison officials continuously thereafter. R774, 786.* Respondent stated the purpose of the grand jury's investigation was to inquire of

*Page references preceded by the letter "R" refer to the Record on Appeal to the Court of Appeals.

"whether or not the crimes of bribery, bribe receiving, receiving reward for official misconduct, official misconduct, escape, coercion, conspiracy, and other related crimes have been committed by any officials or people in the (New York City) Department of Correction, either past or present employees, and also whether any of those crimes have been or are being committed by private citizens." (Minutes of the Extraordinary, Special and Trial Term Grand Jury, August 29, 1977). R. 626.

Petitioner appeared before the grand jury a total of five times in 1977, *i.e.*, August 29, September 7, September 9, November 2 and November 16, and gave testimony before it.

On August 30, 1977, following Petitioner's initial grand jury appearance, the trial court ruled that conversations had directly with a prisoner, James Napoli, had been entered into in a priest-communicant relationship and were protected, as confidential, by state statute, to wit, New York Civil Practice Law and Rules Sec. 4505, *supra,* at 3. R. 377. The trial court held that "a general discussion of the (prison) conditions, if there was such a discussion followed by the understanding of the Father (that he) will do something about it, I think is appropriately within the (statutory) privilege." R. 377-378. As to material not covered by the statutory privilege, Petitioner was directed to respond. R. 390.

At his second and third appearances before the grand jury (September 7 and September 9, 1977), Petitioner did respond to some questions, but declined to respond to others. As to these latter questions, concerning his activities as a priest in Mr. Napoli's behalf, he stated to the grand jury his firm belief that they infringed upon his right to practice his ministry as protected by the First Amendment. R. 728-729; 738-739; 749-751; 774; 776; 779; 782; Appendix at 2a, 4a. Unlike the statutory priest-communicant privilege enunciated in CPLR Sec. 4505, Petitioner made it clear that the right to freely practice one's ministry was personal to the clergyman making the claim, *e.g.*, R. 749-751; 768 (it is from these questions that the eventual adjudgment of contempt stems).

The trial court was to rule twice on the questions propounded at the September, and later November, sessions of the grand jury, specifically, September 29, 1977 and December 21, 1977.[2]

In sum, Petitioner had answered a number of questions before the grand jury which were unaffected by his First Amendment claims. He states, for example, that he knew of no violations of law by public officials or of any illegal actions designed to assist Mr. Napoli. R. 881; 900-901. Yet when asked the questions contained in the Mandate of Commitment (R. 4-5), Appendix at 13a-15a, Petitioner clearly stated that those questions, involving his priestly efforts on behalf of Mr. Napoli, were protected. R. 176, 203, 354-355, 740, 760-761, 888.

The trial court made several trenchant observations, both as to the law and the facts, surrounding Petitioner's predicament. It noted that Petitioner's good faith was beyond reproach. R. 70, 71, 189, 145, 232, 237. The court did not doubt that the issue raised was "a legitimate and significant one" shared, in good faith, by Petitioner's "colleagues and confreres" in the clergy. R. 189.

The court recognized that Petitioner had not made a flat refusal to answer (R. 75) and that whatever activities Petitioner had undertaken on behalf of Mr. Napoli were unquestionably lawful. R. 74; 196. The activities undertaken by Petitioner were of the type that priests normally do and Petitioner was, clearly, acting in a priestly capacity. R. 573; R. 191.

A review of the grand jury proceedings had shown the trial court that Petitioner had no knowledge of improper activities, nor had he done, or become aware of, anything criminal. R. 471-473; 503-504.

In assessing Petitioner's role in the grand jury's investigation, the trial court noted that Petitioner was not a target, nor

2. This latter court action actually began on December 16, 1977 and was adjourned to see whether Petitioner would have a change of heart as to his First Amendment position. R. 198; 228-229.

was the investigation directed at him. R. 146, 148. Petitioner's role was described as "small" and something other than "earth-shaking." R. 109, 437-438. Determining that there were alternative sources of information, the court stated that it "would find it difficult to conclude that (a) compelling showing has been made that (petitioner) has significant evidence of criminal activities which is important for the grand jury to have." R. 572, *accord.,* R. 513, 519.

On December 21, 1977, the trial court adjudged Petitioner in contempt for failing to respond to certain questions propounded before the grand jury. R. 233. As the court had previously stated its reasoning:

> "The issue presented is whether or not the activities in which Father Gigante engaged represent an exercise of his religious ministry and has at least a qualified First Amendment protection, at least to such an extent that there will be required a showing that he has clear information of important matters which the Grand Jury is entitled to know.
>
> The status of this principle is by no means clear."

R. 570. Troubled, the court went on to speak of *Branzburg v. Hayes,* 408 U.S. 665 (1972) as failing to recognize such a privilege, but noting that in the critical concurrence of Mr. Justice Powell, "there might be circumstances under which the claim might be sustained." *Id.* All the more troubling was the non-essential nature of the Petitioner's testimony. Some of the questions in the Mandate asked the witness to recall conversations had with prison and correction officials on behalf of Mr. Napoli. Petitioner refused to answer, pointing out that the grand jury had full tape recordings and transcripts of those conversations (made with the consent of the other party) already before the grand jury. Petitioner's recollection as to whether these conversations occurred or what was said was therefore immaterial. Other questions had been substantially answered previously. Relying on *Branzburg v. Hayes, supra,* the court felt constrained to deny the First Amendment claim and adjudge

Petitioner in contempt.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, affirmed, holding that *Branzburg v. Hayes, supra,* was dispositive.

> "[T]he Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnesses is the Fifth Amendment right against compulsory self-incrimination."

R. 960. The Presiding Justice, however, dissented, stating *Branzburg* to be inapplicable to matters such as these:

> "*Branzburg* dealt with a newspaper reporter's claim of First Amendment protection; not with the historical and more universally recognized clergy-communicant privilege."

R. 961.

The Court of Appeals of the State of New York similarly affirmed, relying on *Branzburg*, and holding in substance that the grand jury's investigative power was, by itself, superior to Father Gigante's right to freely practice his ministry. Appendix at 1a.

By order of the trial court justice, the Petitioner's sentence of 10 days imprisonment has been stayed pending the Court's action on his petition.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW NEEDLESSLY AND IMPROPERLY ABRIDGES APPELLANT'S FREEDOM OF RELIGION.

The area of governmental intervention and religious independence has been described as "highly sensitive" and one where only the most paramount governmental needs and interests will be permitted to limit, in any respect, religious freedoms. *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). Even showing of a compelling or paramount state interest does not warrant an infringement of an individual's freedom of religion unless the state's interests are "not otherwise served" [*Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972)] and there are "no alternative forms of regulation" [*Sherbert v. Verner, supra* at 407].

While the free exercise of one's religion is not absolute [*Braunfield v. Brown,* 366 U.S. 599 (1961)], it should only be regulated when it poses "some *substantial* threat to public safety, peace or order." *Sherbert v. Verner, supra* at 402-403 (emphasis supplied). Although "religiously grounded conduct must often be subject to the broad police powers of the State, . . . there are areas protected by the Free Exercise Clause of the First Amendment and thus beyond the powers of the State to control." *Wisconsin v. Yoder, supra* at 220. Thus, "only those interests *of the highest order* and those *not otherwise served* can over-balance legitimate claims to the free exercise of religion." *Id.* at 215 (emphasis supplied).

In the case at bar, the evidence sought to be obtained by the grand jury from Petitioner was already possessed by the grand jury; in large part, in far superior and more accurate form than Petitioner's mere recollection. Consequently, requiring Petitioner to repeat, by his testimony, this material, arguably served no legitimate purpose at all, let alone any paramount state interest. Thus, in the absence of such a finding and given the inconsequential nature of the evidence Petitioner could impart to the grand jury, the court below was constitutionally required to respect and protect Petitioner's overriding religious interests.

That this protection should extend under these circumstances regardless of the extent of impact on Petitioner's right is manifest. Though in the case at bar the impact is great,[3] so long as there is indeed an impact, the First Amendment must be served. *Cf. McDaniel v. Paty,* 435 U.S. 618 (1978).

Furthermore, in any judicial examination of governmental restraints on First Amendment rights not only should the specific factual context examined but the resultant effect on religious freedom as a whole—the so-called "chilling effect"—must be considered. *Weiman v. Updegraff,* 344 U.S. 183 (1952). Should Petitioner's conviction be affirmed, there will be a significant chilling effect on both the activities of clergy in the course of their ministry and in the candor with which prisoners and other communicants confide in their clergyman.

The New York Court of Appeals ruled,

> "Appellant's broader contention that he would not respond to the questions posed by the Grand Jury because disclosure would unduly impinge upon the right to practice his ministry as guaranteed by both the State and Federal Constitutions is equally without merit. In our view, the Constitutional rights claimed by appellant cannot serve to justify his refusal to answer."

Appendix at 6a.

In so holding the court wrongly interpreted *Branzburg* and lower court cases[4] to mean that the grand jury's investiga-

---

3. Petitioner's ministry was uniquely addressed to prisoners. R. 227, 175, 176.

4. For example, the Court found authority in *People v. Woodruff,* 26 A.D.2d 236, 239, *affd.* 21 N.Y.2d 248 (1968), which held, "The State's interest in enforcing the power of the grand jury to inquire into the commission of crime is paramount to the contemnor's religious right in the context of this case . . . Her religious scruples must give way to the dominant right of the State to maintain peace and order."

tive role was omnipotent, even to the extent of seriously and unnecessarily abridging the right to free exercise of one's religion. This certainly cannot be the intent of the Bill of Rights.

It is beyond peradventure that the First Amendment holds a preferred position among the other constitutionally protected areas, *e.g., NAACP v. Button,* 371 U.S. 415, 433 (1963). Central to that amendment are those values underlying its Freedom of Religion provisions. *Wisconsin v. Yoder, supra* at 234. Unlike the right to free exercise of religion, which has clearly been incorporated to the States as a limitation on state government, *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the right to indictment by grand jury is not even required in many states and an attempt to constitutionally require that right in state proceedings has long been rejected. *Hurtado v. California,* 110 U.S. 516 (1884).

It is clear that a "grand jury subpoena is (not) some talisman that dissolves all constitutional protection." *United States v. Dionisio,* 410 U.S. 1, 11 (1973). The court below merely paid lip service to balancing the competing interests of the state and the individual, and simply reiterated that the grand jury, on its face, serves a compelling purpose. While Petitioner agrees that the grand jury serves an important function in our society, it must not take absolute precedence over the cherished freedom of religion afforded by the First Amendment. Decisions enunciated by the Court give support to Petitioner's contention that, in the light of his inability to impart meaningful and significant new evidence to the grand jury, his freedom to practice his ministry should have taken precedence. *NAACP v. Button, supra; Sherbert v. Verner, supra; Wisconsin v. Yoder, supra; Thomas v. Collins,* 323 U.S. 516 (1945).

Petitioner would submit that, in the light of the foregoing discussion, to ask a witness to recollect conversations, which both the witness and the grand jurors know have been recorded and transcribed (and are placed before all of them as the questions are asked), in the face of the witness' avowed sensitivity to the effect upon his ability to freely exercise his religion, is improper under the First Amendment. In such a case the interest of the grand jury is certainly something short of compelling while the interest of the witness is basic and primary.

II.

THE COURT BELOW ERRED IN EXTENDING *BRANZBURG v. HAYES, SUPRA,* TO FREEDOM OF RELIGION CASES.

This Court held in *Branzburg v. Hayes,* 408 U.S. 665 (1972), that, in the factual settings presented by the three appeals considered, reporters had no testimonial privileges in the face of grand jury questioning. However, the Court specifically narrowed its holding by stating, "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Branzburg, supra* at 682. Thus, by this Court's own limitation, *Branzburg* was not to be applied expansively.

Moreover, the facts of *Branzburg* differ radically from those of the instant case, thereby making *Branzburg* even less applicable. First of all, there were no readily available alternative means for the grand jury to obtain the information it sought in *Branzburg* other than by questioning the reporters. The grand jury, thus, likely had a compelling reason for calling them. "The grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred. . . ." *Branzburg, supra,* at 701. As already shown, the grand jury had no need to call Petitioner. In the words of *Branzburg,* he was not needed to "supply information to help the Government," since the grand jury already had the information it sought. Secondly, the interests to be served by protecting reporters' right to report are not as strong as those to be served by protecting the free exercise of religion by clergy and

citizens everywhere. The purpose behind protecting a reporter's information gathering ability indirectly affects the public's right to know, which, although important, is not as central to our society as the primary and basic right to practice one's religion freely. Finally, *Branzburg* found that forcing disclosures upon reporters would only indirectly affect their ability to gather information and would thus only affect remotely, if at all, the public's right to know.[5] This must be contrasted with the immediate effect on clergy and public alike should Petitioner's conviction be upheld. Priestly missions are an integral part of the practice of religion. Clergy must be afforded constitutional protection in effectuating their missions, for without it, there can be no missions at all. Unlike the reporters in *Branzburg,* who probably would have obtained their news without special protection from grand jury questioning, Petitioner, and other socially active and committed clergymen, clearly rely on the First Amendment to protect their priestly activities among those to whom their missions are directed.

The import, and the resultant impact, of *Branzburg,* Petitioner would contend, is limited by the facts of the case and the position of the parties before the Court.

Unlike the situation in the case at bar, the reporters in *Branzburg* argued that it was incumbent on the grand jury seeking their testimony to first exhaust any available alternative means available to garner similar information. The burden, the reporters argued, would be on the grand jury to show that the reporters' testimony was essential. Compare, therefore, the matter currently before the Court. Here, the information sought from the witness expressing a First Amendment claim

5. The *Branzburg* Court noted, "Nothing before us indicates that a large number or percentage of all confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." 408 U.S. at 691.

has already been before the grand jury (and in a far more accurate, dispassionate and reliable form). "Alternative means," therefore, is not truly at issue, for that term directs itself at further and additional action by the grand jury.

Yet even more important is Mr. Justice Powell's short but cautionary concurrence, which supplied the fifth vote needed for majority. Mr. Justice Powell reminded that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." 408 U.S. at 710

It is doubtful that the Court could have foreseen that so many others would misread the *Branzburg* opinion. In the case at bar, it is extended to the Freedom of Religion clause, even though the Court's holding was specifically limited to Freedom of Press and Speech. 403 U.S. at 667. The Court below held that *Branzburg* was controlling of Petitioner's claims. Appendix at 6a, 3a. (It was only the Presiding Justice of the intermediate appellate tribunal who, stating it simply, found *Branzburg* inapplicable. (407 NYS 2d at 164).

The Court has never viewed the powers of the grand jury as absolute. Those powers are to be tempered with reasonableness, fairness and necessity. At times, and in certain situations, there are interests which overbalance the grand jury's right to everyman's evidence, most notably in situations involving the Fifth and Fourth Amendments. *Branzburg v. Hayes, supra* at 737 (Stewart, J., dissenting). To permit, without additional guidance, the extension and application of the Court's opinion in *Branzburg* into the most traditional and jealously guarded area of personal religious freedom would be unfortunate. To needlessly require Petitioner to choose between his God and his freedom is a choice so repugnant to the American experience that it is deserving of comment, analysis and review.

CONCLUSION

THE PETITION SHOULD BE GRANTED BY THIS COURT.

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Petitioner
233 Broadway
New York, New York 10007
(212) WO 4-3200

BARRY IVAN SLOTNICK
JAY L.T. BREAKSTONE
of Counsel

APPENDIX "A"
OPINION OF THE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
Deputy Attorney General, John F. Keenan,
Special State Prosecutor,

Respondent,

vs.

Reverend Louis R. Gigante,

Appellant.

---

(143) Barry Ivan Slotnick & Jay L.T. Breakstone, NYC for appellant.

John F. Keenan, Deputy Attorney General, Special State Prosecutor (Thomas A. Duffy, Jr., Mark M. Baker & Michael Shapiro of counsel) respondent pro se.

JASEN, J.:

We are called upon in this case to balance the weighty considerations of society's right to expose criminal improprieties within the New York City Department of Correction and a priest's solemn obligation to assist those who beckon for his guidance and help in the utmost confidence.

These are the pertinent facts. At the direction of the Extraordinary Special and Trial Term Grand Jury of New York County, appellant Reverend Louis Gigante, an ordained priest of the Roman Catholic faith and, at the time, a New York City Councilman, was subpoenaed to appear and testify before the Grand Jury, impaneled to investigate abuses and improprieties within the New York City Department of Correction, with respect to preferential treatment accorded certain members of organized crime incarcerated in New York City correctional facilities. On August 29, 1977, appellant, after receiving immunity (CPL 190.40), was questioned concerning both his relationship with various employees of the Department of Correction and his efforts to secure for one James Napoli, a prisoner incarcerated from October 1974 to March 1975 in institutions under the jurisdiction of the New York City Department of Correction, a Christmas furlough and entrance into a work-release program. Although appellant responded to these questions, when asked if he had any conversations with Napoli concerning the conditions of Napoli's incarceration, appellant refused to answer asserting the priest-penitent privilege. On August 30, 1977, the presiding Justice ruled that "the privilege was appropriately invoked" with respect to these conversations.

On September 7th, appellant reappeared before the Grand Jury and was asked about a conversation he had with an officer of the New York City Department of Correction which was allegedly prompted by an earlier discussion with Napoli. Appellant did not respond, stating: "I really refuse to answer basically, not only as a priest, but that the questions attempt to infringe upon my practicing my ministry, which is protected by the First Amendment of the Constitution."

Again, on September 9th, appellant refused to answer several inquiries upon the ground that the priest-penitent privilege and his First Amendment right to practice his ministry precluded him from replying. A sampling of the questions are as follows:

"Q. Do you recall speaking to Mr. Ford [a Correction Department official] about James Napoli, Sr. and concerning the possibility of Mr. Napoli being put in a work-release program?

* * *

Q. Do you recall saying in substance to Mr. Ford, 'And if I prove that people have gotten out who are heavy gamblers, who are organized crime what happens then, make a big stink about it? I know a lot of things that have happened that I will not divulge at this time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli.'

Do you recall telling that to Mr. Ford?

* * *

q. During the period of time from October 30, 1974 to March 27, 1975, did you talk to Jesse Harris [a Correction Department official] concerning getting Mr. Napoli in a work-release program?

* * *

Q. During the period of October 30, 1974 to March 27, 1975, did Jesse Harris refer you to Deputy Commissioner Birnbaum concerning the possibility of getting James Napoli into a work-release program?

* * *

Q. Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your brother transferred from Rikers Island to a less strict institution in the Department of Correction?"

The parties sought the assistance of the court to determine whether appellant was justified in refusing to answer. On September 29th, the Judge, although observing that nothing in the minutes before the Grand Jury intimated that appellant engaged in any criminal activity, found that the "Grand Jury might reasonabl[y] wish to inquire into the apparent use in part of [appellant's] position as a public official on behalf of a prisoner * * *, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment." The court denied appellant's claim of a First Amendment privilege "ex-

cept as to his conversations with Mr. Napoli," and directed appellant to answer questions "relating to either his efforts to secure a furlough or work-release program for Mr. Napoli or as to any knowledge that he may have of preferential treatment that Mr. Napoli received in terms of visitors, food, assignments, [and] work assignments."

Thereafter, on both November 2 and 16, 1977, appellant again testified before the Grand Jury. On November 16th, appellant refused to reply to many of the inquiries which the court had previously determined to be proper. Appellant reiterated his position that he would not respond because to do so would jeopardize the free exercise of his ministry. Further, appellant asserted that the prosecutor had already obtained the requested responses insofar as appellant had fully answered such inquiries at prior proceedings and the prosecutor had in his possession a transcript of the conversations between appellant and Mr. Ford, a Correction Department official, which had been recorded by the latter.

On December 16 and 21, 1977, appellant, pursuant to an order to show cause, appeared before the court to explain why he should not be adjudged in criminal contempt (Judicial Law, §750) for his refusal to respond to those questions which the court had directed him to answer. Appellant, remaining steadfast in his prior position that he would not respond, was held in contempt and committed to prison for ten days. On appeal, the Appellate Division affirmed the judgment of contempt.[1] There should be an affirmance.

On this appeal, appellant justifies his recalcitrance before the Grand Jury on two grounds: First, the existence of a priest-penitent privilege which forbids disclosure of the requested information; and, second, the right to practice his ministry

1. By order dated September 7, 1978, the Appellate Division stayed the execution and enforcement of the judgment of Supreme Court pending the determination of this appeal.

unhampered by the "chilling effect" which compelled disclosure might breed. We now conclude that neither asserted justification can serve to shield appellant from his obligation to respond to the Grand Jury's inquiries.

It has been recognized, without serious disagreement, that there existed no common law priest-penitent privilege. (See, generally, 8 Wigmore, Evidence [McNaughton rev 1961], §2394; Richardson, Evidence [10th ed], §424). By statute, however, "a confession or confidence made to [a clergyman] in his professional character as spiritual advisor" shall not be disclosed "[u]nless the person confessing or confiding waives the privilege." (CPLR 4505). It is clear that the Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized.

The priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be "reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential" for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect. (*Matter of Puglisi v. Pignato,* 26 AD 2d 817; CPLR 4505; see *People v. Gates,* 13 Wend. 311, 323-324; *Kruglikov v. Kruglikov,* 29 Misc 2d 17, app dsmd 16 AD2d 735; *United States v. Wells,* 446 F2d 2, 4; see, generally, Ann., Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends, 71 ALR3d 794, 808809).

Although we recognize that statutes bestowing an evidentiary privilege should be construed in furtherance of their "policy to encourage uninhibited communication between persons standing in a relation of confidence and trust" (*People v. Shapiro,* 308 NY 453, 458-459), it is all too apparent here that the questions which appellant was directed to answer did not jeopardize the atmosphere of confidence and trust which

allegedly enveloped the relationship between appellant and Napoli. Rather, the inquiries were directed to elicit from appellant efforts taken by him, independent of any communications between appellant and Napoli, to secure for the latter entrance into a work-release program. Compelling disclosure as to these matters would not do violence to the social policies underlying the priest-penitent privilege insofar as appellant contacted officials of the Department of Correction, strangers to the confidential relationship, in his attempt to assist Napoli. It is only these contacts with the Department of Correction officials that the court ordered disclosed, and the revelation of such conversations, spoken outside the sphere of confidentiality, cannot be said to fall within the sanctuary of the priest-penitent privilege.

Appellant's broader contention that he would not respond to the questions posed by the Grand Jury because disclosure would unduly impinge upon the right to practice his ministry as guaranteed by both the State and Federal Constitutions is equally without merit. In our view, the constitutional rights claimed by appellant cannot serve to justify his refusal to answer.

There can be little doubt that the Grand Jury serves a compelling State interest to ensure that peace and order is maintained in our society.[2] It functions to protect the community from disruption by those who elevate and obtain their purely personal desires in ways not sanctioned by society-at-large, while, at the same time, protecting persons from unfounded accusations. (See *People v. Woodruff,* 26 AD2d 236, 238-239, affd 21 NY2d 848; *Branzburg v. Hayes,* 408 US 665, 686-688; *Smilow v. United States,* 465 F2d 802, 804-805, vacated on other grounds 409 US 944).

In furtherance of its essential function, the Grand Jury, as

2. As our State Constitution commands: "The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law." (N Y Const, art I, §6.)

an arm of society, is entitled to the assistance of all members of the community in uncovering criminal acts. The enduring command that " '[e]very man owes a duty to society to give evidence when called upon to do so' " must be honored if the fundamental task of the Grand Jury is to be realized. *(People v. Woodruff,* 26 AD2d 236, 238-239, *supra,* citing *Matter of Manning v. Valente,* 272 App Div 358, 364, affd 297 NY 681; see *Branzburg v. Hayes,* 408 US 665, 688, *supra;* cf. *Matter of Jacqueline F.,* ____NY2d____ [decided herewith].)

On the record before us, appellant raises no colorable First Amendment right. His right to practice his ministry cannot serve to shield him from shedding light upon whether or not any unlawful efforts were undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance int work release programs or to obtain a transfer to less secure institutions. In so holding, we observe that the statutory privilege (CPLR 4505) affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute. (Cf. *Branzburg v. Hayes,* 408 US 665, *supra.*) Absent a showing that the conversations sought to be disclosed are embraced by the priest-penitent privilege, appellant, even though a clergyman, is, like all citizens, obligated to respond to those questions relevant to the Grand Jury's investigation.

Nor do we accept appellant's contention that insofar as the Special Prosecutor already received the necessary responses to his questions or possessed an alternate source from which they could be obtained, further compelled answers would serve only to infringe upon, without reason or justification, appellant's asserted constitutional rights. Faced with a similar challenge involving a claim by reporters that the State must first demonstrate "that a crime has been committed and that [the reporters] possess relevant information not available from other sources" before they can be required to testify before the Grand

Jury, the Supreme Court in *Branzburg v. Hayes* (408 US 665, *supra*) observed:

> "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area *** society's interest is best served by a thorough and extensive investigation.' *Wood v. Georgia,* 370 U.S. 375, 392 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' *United States v. Stone,* 429 F.2d 138, 140 (CA2 1970)." (*Id*, at p. 701.)

Simply stated, it is for the Grand Jury to determine the most efficacious procedure to carry out its investigation, and even assuming the Grand Jury could have obtained the answers to its stated questions from an alternate source, it was entitled to hear such answers from appellant and probe further into the facts so revealed if it deemed more extensive inquiry necessary to carry out its function.

In sum, we now hold that in the context of this case appellant was not justified, either by virtue of the claimed priest-penitent privilege or by reason of his claimed right to practice freely his ministry, in refusing to respond to the questions which the court directed him to answer. As to appellant's remaining contentions, we find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

* * * * *

Order affirmed, without costs. Opinion by Jasen, J. Concur: Cooke, Ch. J., Jones, Wachtler and Fuchsberg, JJ. Gabrielli, J., taking no part.

Decided May 8, 1979

APPENDIX "B"
OPINION OF APPELLATE DIVISION

Application of Deputy Attorney General,
John F. KEENAN, Special State Prosecutor,

Petitioner-Respondent,

v.

Reverend Louis R. GIGANTE,

Respondent-Appellant,

Roman Catholic Archdiocese of New York,
Amicus Curiae.

Supreme Court, Appellate Division,
First Department

July 20, 1978

Appeal was taken from a judgment of the Supreme Court, New York County, Leonard H. Sandler, J., committing witness to prison for ten days for criminal contempt in refusing a direction to answer questions before the grand jury. The Supreme Court, Appellate Division, held that clergyman had no privilege not to answer questions before grand jury where inquiries did not concern confidential communications or confessions made by penitent to clergyman.

Affirmed.

Murphy, P.J., dissented in a memorandum.

Kupferman, J., filed a memorandum concurring in part and disssenting in part.

1. Grand Jury 36

Clergyman had no privilege not to answer questions before grand jury where inquiries did not seek disclosure of confidential communications or confessions made by penitent to clergyman. CPLR 4505.

2. Witnesses 215

There is no privilege, common law or statutory, which invests a clergyman's ministry with immunity against disclosure; statutory privilege protects only confidential communication or confession made by penitent to clergyman or spiritual advisor. CPLR 4505.

T.A. Duffy, Jr., Great Neck, for petitioner-respondent.

B. I. Slotnick, New York City, for respondent-appellant.

L. X. Cusack, New York City, for amicus curiae.

Before MURPHY, P. J., and KUPFERMAN, BIRNS, EVANS and SULLIVAN, JJ.

MEMORANDUM DECISION

Judgment, Supreme Court, New York County, entered December 29, 1977, committing appellant to prison for 10 days for criminal contempt in refusing a direction to answer questions before the grand jury, affirmed, without costs or disbursements.

[1] *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 is dispositive of appellant's claim of privilege. Although confronted with a freedom of the press issue, the Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnesses is the Fifth Amendment right against compulsory self-incrimination. (*Id.* at pp. 689-690, 92 S.Ct. 2646).

[2] There is no privilege, common law or statutory, which invests a clergyman's ministry with an immunity against disclosure. The statutory privilege, which was unknown at common law (see Richardson, Evidence, §424 [10th ed., Prince 1973]), protects only the confidential communication or confession made by the penitent to the clergyman or spiritual advisor (CPLR 4505). The inquiries here in no way sought to invade that sanctuary.

All concur except MURPHY, P.J., who dissents in a memorandum and KUPFERMAN, J., who concurs in part and dissents in part in a memorandum as follows:

MURPHY, Presiding Justice (dissenting).

I find neither an abandonment by appellant of his claim of privilege nor the holding in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 2d 626, applicable to this case.

Branzburg dealt with a newspaper reporter's claim of First Amendment protection; not with the historical and more universally recognized clergy-communicant privilege.

Appellant was ordained a priest of the Roman Catholic faith in 1959 and for some 18 years thereafter (including the 4 year period during which he was an elected member of the City Council) he visited prisons and ministered to prisoners as part of his priestly ministry.

Although the Justice presiding at the Extraordinary Special and Trial Term sustained appellant's invocation of the priest-penitent privilege, he improperly limited it solely to conversations between appellant and the prisoner Napoli; and denied it with respect to appellant's activities in Napoli's behalf as a result of such conversations.

In my view, the asserted actions taken by appellant were also in exercise of his ministry as a priest of the Roman Catholic Church and were, in the circumstances here presented, equally protected.

Accordingly, I would reverse the order appealed from and vacate the commitment mandated thereby.

KUPFERMAN, Justice (concurring in part and dissenting in part).

The Court of Appeals in a case involving the question of whether a clergyman, who was also a lawyer, could wear his clerical garb while on trial, *La Rocca v. Lane,* 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606, while recognizing the "right to free exercise of religion, certainly a preferred right included among the great human rights in a free and open society" (p. 581, 376 N.Y.S.2d p. 99, 338 N.E.2d p. 611), still determined that there was a proper line of demarcation between the lay and the ministerial function. Of course, this was long ago recognized at the source. "Render therefore unto Caesar the things which are Caesar's." Matthew 23:21. See also Mark 12:17; Luke 20:25. Nonetheless, I would reduce the commitment, as a matter of discretion, to one day. The principle having been established, no purpose would be served by a longer period of incarceration.

APPENDIX "C"
MANDATE OF COMMITMENT FOR CRIMINAL CONTEMPT

At an Extraordinary Special and Trial Term of the Supreme Court of the State of New York, County of New York, at the Criminal Court Building, 100 Centre Street, New York, New York, on the 27th day of December, 1977.

PRESENT:
HON. LEONARD H. SANDLER
Justice of the Supreme Court

In the Matter of
The Application of Deputy Attorney General
JOHN F. KEENAN, Special State Prosecutor,

Petitioner,

-against-

REV. LOUIS R. GIGANTE,

Respondent.

Petitioner, John F. Keenan, Special State Prosecutor, having moved by order to show cause, dated December 13, 1977, for an order, pursuant to section 750 and 751 of the Judiciary Law, adjudging the respondent, Rev. Louis R. Gigante, guilty of criminal contempt for his willful, contumacious and unlawful refusal to answer legal and proper interrogatories asked of him while he was a witness before the Extraordinary Special and Trial Term Grand Jury of New York County;

NOW, upon reading and filing the order to show cause dated December 13, 1977, with proof of due and timely service thereof, the affidavit of Thomas A. Duffy, Jr., duly sworn to December 13, 1977, in support of petitioner's application, and the affirmation of Barry Ivan Slotnick, dated December 15, 1977, together with the exhibits annexed thereto, in opposition to petitioner's application and after a hearing on the application conducted on December 16 and 21, 1977, and upon reading and considering all of the exhibits submitted in support of and in opposition to the application, it is

ORDERED AND ADJUDGED, that the said witness respondent, Rev. Louis R. Gigante, be and is hereby found guilty of Criminal Contempt of this Court as a result of his willful, contumacious and unlawful refusal to answer, on November 16, 1977, while a witness before the Extraordinary Special and Trial Term Grand Jury of New York County, legal and proper interrogatories which this Court, on September 29, 1977 directed him to answer, to wit:

"Do you recall speaking to Mr. Ford about James Napoli, Sr., and concerning the possibility of Mr. Napoli being put in a work release program?"

"Do you recall saying in substance to Mr. Ford, 'And if I prove that people have gotten out who are heavy gamblers, who are organized crime, what happens then? Make a big stink about it? I know a lot of things that have happened which I will not divulge at that time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli.' Do you recall telling that to Mr. Ford?"

"And during the period from October 30, 1974, to March 27, 1975, did you talk to Jesse Harris concerning getting Mr. Napoli in a work release program?"

"During the period of October 30, 1974, to March 27, 1975, did Jesse Harris refer you to Deputy Birnbaum, Deputy Commissioner, concerning the possibility of getting James Napoli into a work release program?"

"Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your brother transferred from Riker's Island to a less strict institution in the Department of Correction?"

AND IT IS ORDERED AND ADJUDGED, that the said witness respondent, Rev. Louis R. Gigante, for the said Criminal Contempt of the Court, be imprisoned in a New York Cityi Correctional Institution For Men for a period of ten (10) days, the period of imprisonment to be stayed until January 13, 1978, pending an application to the Appellate Division, First Department, for a stay.

ENTER:
s/Leonard H. Sandler
LEONARD H. SANDLER
Justice of the Supreme Court

APPENDIX "D"
EXCERPTS OF MINUTES

Colloquy

THE COURT: I denied the motion, okay.

MR. SLOTNICK: —is well aware in his running commentary of the responses of the leading cases in this area, including Bronston, which although it's a perjury case deals with whatis responsive and what is not responsive.

With regard to the responses given by Father Gigante, at this moment in time I would address myself strictly and solely to the papers that the special prosecutor—

THE COURT: I am virtually hoping for a little more.

MR. SLOTNICK: I cannot until such time as I receive my discovery and even at that time I cannot indicate to the Court whether I will be able to come back with a less ambiguous response.

THE COURT: It's not clear to me, Mr. Duffy, whether

each of the recorded conversataions that were the subject of questions to Father Gigante, that he was given transcripts of the recordings in connection with the questions. I know it was done in part, at least part.

MR. DUFFY: He was shown some transcripts, Your Honor.

* * *

when you say that, I think it might lead to inferences which are unfair to your client, although I'm sure you do not intend that.

It would not be fair to suggest that it's been a lengthy investigation into your client. It's been a lengthy investigation into aspects of certain events in the Department of Correction in which your client plays a relatively small role.

MR. SLOTNICK: That's clear, your Honor. I will relate to that in subsequent argument.

I have presented to the Court on a prior occasion certain theories of defense—

THE COURT: I'm trying to confine at the moment to the question of discovery, which I see is preliminary—

MR. SLOTNICK: That's what I'm getting to. It's relevant to the discovery.

One of the theories of defense that we presented to the Court is the fact that there are alternative means within which the Special Prosecutor might receive total and full responses.

The Court, even after reading the Smilow case, which apparently is a pronouncement of the Second Circuit, tended at that time to direct Father Gigante to respond.

We would like to be able to fully prepare and present our defense, to have all of the grand jury minutes. If your Honor does not again allow us the luxury of having the grand jury minutes, then I think I can pretty well show the alternative means and methods by what I've already gotten the fact that the grand jury had that.

THE COURT: I think that having read them myself I am aware of the fact that there are certain areas, alternative sources of information.

The question is whether or not the grand jury is nonetheless entitled to Father Gigante's answers in those areas and related areas. And my conclusion, reached sometime ago, which was the basis of my direction earlier to Father Gigante, was that they were entitled in specific areas to this information.

MR. SLOTNICK: We would indicate, your Honor, at a later date—again, I just don't want

* * *

"Answer: I'm not going to answer until I see the Judge.

"Question: Did you speak to Jesse Harris concerning your brother, Ralph Gigante?

"Answer: Don't you have that answer, Mr. Keenan?

"Question: Did your brother Mario ever tell you that he paid $50 to a correction officer to do favors on behalf of the prisoner, James Napoli?"

I must say the last question is a different theme and apparently was not the subject of a direction by me to the witness.

Am I correct, Mr. Duffy?

* * *

of an investigation not directed at him, perfectly legitimate, in which it was in fact proper to find out whoever did anything on behalf of prisoners, whether it was he or anyone. That's just a comment which I hope will have some impact.

Mr. Duffy, I think the Grano answers, I must admit, were fairly full. I think you must admit also on the occasion of the first meeting, although there was resistance to an effort to go to the subject matter again.

On the others, the principal defense is that he said with regard to questions based upon taped conversations, you already have that information. Logically, that amounted to an affirmance of the events that occurred, and although clearly not an affirmance which is appropriate in responding to a grnad jury as a general principle, the argument I think is that it does not represent a wilful defiance of my direction to answer.

Do you wish to be heard on that?

MR. DUFFY: Your Honor, with respect to the answers, they were not answers to the

* * *

THE COURT: (Continuing) But I think that the areas of questioning that I perceive as being pursued are appropriate for the grand jury.

There is no indication yet of any knowledge on his part of improper activities in connection with Mr. Napoli. There may not be such knowledge. But I think they have a right to find out what, if anything, he knew about it.

Now, I'm not happy, and I've made that clear about the citation of contempt with regard to the particular questions and the particular answers, but I am prepared to make a direction and I would hopefully—and I would hope I could make it fairly quickly and give you and Father Gigante at least over lunch to think about it, and then we might reassemble.

I want Father Gigante to answer specifically the questions with regard to conversation with Ford, Harris, and—the last 5 questions. If the answer, he cannot in good conscience say that which he implied, I would view that as a wilfull refusal and would reluctantly and most unhappily make a finding of contempt which,

* * *

in terms of having been helpful in what would appear and be described as a constructive way in regard to preventing the removal of a senior person for political reasons.

So combined political or communal relations with another person, all that seems to be mixed into the picture. And taken by itself, the problem there is not that anything that was done is something that I would consider improper or that a Grand Jury does consider improper, but whether or not it is an appropriate subject of a Grand Jury inquiry in connection with other evidence in this case as to whether his political influence was being used in part on behalf of a prisoner who was receiving some consideration from other people at the same time.

Side by side with this—I'm not sure "side by side" is correct—but on a parallel to this, there is evidence that Mr. Napoli was receiving what would appear to be preferential treatment.

Members of his family were obviously concerned that he should be comfortable and happy, get assignments appropriate to his age, be secure in terms of other prisoners, be treated as well as possible; and for varying reasons and varying considerations, that there was a response by members of the Department of Correction to those independent efforts.

I see no evidence that Father Gigante was personally at all connected with these independent efforts; nor any direct evidence that he had knowledge of them, although whether or not he did might well be an aspect of the interrogation. And as to whether these other efforts and their responses were criminal, I'm by no means clear. I suspect there's a prima facie case against somebody for giving unlawful gratuities. Somebody from the Prosecutor's Office might think and the Grand Jury may think that would spell out a more serious charge than that, I'm not sure.

* * *

And I don't know that I must tell you, but under the circumstances, I found it very compelling myself that a group concerned with counseling people who had conscientious scruples against participating in the Vietnamese War in a spiritual and advisory way, that an effort was made to invade the records and documents of their activities. And I think that Vorplank does represent, in part, a holding in that area that there must be some showing of justification to overcome this kind of invasion, the kind that was involved there.

You see, the problem—I have a feeling and I've had it for some days that I'm living in a fantasy world in this case, and maybe you are, as well. I'm not saying it is a fantasy, but the situation is a fantasy.

There is no indication that you've done anything, in my opinion, that is criminal or culpable, although certainly in some of your responses people disagree with you in terms of your

evaluation of a particular person. There might be a disagreement as to how realistic that is. That doesn't mean it's culpable.

There is no evidence that you were aware of anything illegal occurring or of favored treatment being given. And yet I would not be unhappy if the Grand Jury said, "Well, why bother with it?" That would strike me as very reasonable.

But if they feel that they want to explore what seems to them to be a test case of an attempt to use a political position to affect the situation of a prisoner when they view as an organized crime figure, I find it hard to see that they don't have the right to get answers to that.

Although, I am appalled at the prospect of a ruling that would result in a refusal, that would result in a contempt, and what have you. I'm appalled by it.

It seems to me to be a fantasy be-

* * *

different.

THE COURT: This is not critical, but it is something else on my mind.—

MR. SLOTNICK: In terms of that so the record is clear, I seriously doubt if I would be entitled to all the Grand Jury minutes. But if I made an issue of alternative means, I think I would be entitled to them.

THE COURT: Let me just express a couple of comploting thoughts, or at least different thoughts.

One is, at the time the notion to quash was filed, I would say frankly I was wholly unaware of the character of the argument that has subsequently developed, which I think is, if not under the circumstance ultimately persuasive to me, it certainly is not frivolous.

MR. BORNSTEIN: By that, you're referring to the arguments that are now in issue, Judge?

THE COURT: Right. I don't consider them frivolous, because in part I think my response really rests upon a factual sense that it's not a pure priest-ministry situation; that if it were, I might be persuaded to apply a balancing test. And in view of

my perhaps incorrect assessment of the evidence, I would conclude that a compelling need had not been shown. Opinions can disagree on that.

Mr. Slotnick, for whatever reasons, was induced to withdraw the motion. But I think that it would not, as I see it, be injurious to permit a procedural situation in which the Appellate Division could have the option, if they wished, of considering that issue.

I'm not convinced that what I'm proposing, in fact, will be taken by them as permitting an appeal, but it's in an effort to create a situation in which they may at least consider whether an appeal is appropriate and whether or not they think the issues merit a stay on argument.

And I'm not persuaded that the investigation will suffer in any significant

* * *

that were presented, but I would find it difficult to conclude, that compelling showing ahs been made that he has significant evidence of criminal activities which is important for the Grand Jury to have.

On the other hand, by traditional standards, it seems to me that the Grand Jury might reasonably wish to inquire into the apparent use in part of his position as a public official on behalf of a prisoner whom they view, whom it has been related to them is a member of organized crime, to use a term which has been thrown around, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment.

So by traditional standards, a basis for his testimony has been established.

The question is whether the First Amendment claim is sufficiently valid to impose the kind of burden that it has been suggested would be imposed on the Grand Jury if it were valid.

The problem is a complicated one.

Father Gigante is a priest, and that which he did, in fact, is suitable to the ministry. And he has presented just a few

moments ago I think a very thoughtful and illuminative picture of his concept of the ministry and as it applied to Mr. Napoli.

As against that, the evidence discloses a relationship which, on the face of it, appears to have been a close personal one.

There is no indication that Mr. Napoli was a parishioner, or that there was an ongoing traditional priest-parishioner relationship. And in the conversations which have been the subject of testimony, there are interspersed with the efforts on Mr. Napoli's behalf illusions to efforts on behalf of the Department of Correction and of high officials of the Department of Correction made by Father Gigante at least in part in his capacity as a public official.

Recognizing that what he did was suitable to a minister and that from his point of view he was acting as part of his ministry, the total picture presented, in my view, makes questionable the application of a privilege, the legal basis for which even at this point I think is quite unclear.

There's also been some questioning about efforts to alter assignments for Mr. Crane.

I must say that I'm baffled at the pursuit of that particular area of inquiry because the evidence indicates that a picture was presented to Father Gigante of what clearly would be an injustice to Mr. Crane in terms of his assignment, to which his response would, I thought, have been a clearly appropriate one. But I suppose consistent with the general right of the Grand Jury, they can ask him about that as well if they wish to.

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

RODERICK C. LANKLER
Deputy Attorney General
Special State Prosecutor
2 World Trade Center
New York, New York 10047
(212) 466-1250
Respondent Pro Se

MARK M. BAKER
THOMAS A. DUFFY, JR.
Special Assistant Attorneys General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

The respondent, Roderick C. Lankler, Deputy Attorney General of the State of New York and Special State Prosecutor, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Court of Appeals of the State of New York in this case dated May 8, 1979.

Opinions Below

The opinion of the Court of Appeals is reported at 47 N.Y.2d 160, 417 N.Y.S.2d 226 (1979). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is reported at 65 A.D.2d 585, 407 N.Y.S.2d 163 (1st Dept. 1978).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 8, 1979. The petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Whether a priest and elected public official has a privilege under the free exercise of religion clause of the First Amendment of the United States Constitution, to refuse to answer questions posed by a grand jury seeking, pursuant to a legitimate inquiry into preferential treatment accorded a certain individual incarcerated in New York City Correction institutions, his recollection of statements he made to correction officials and his recollection of meetings he had with correction officials on behalf of the prisoner who received the preferential treatment.

Constitutional Provisions Involved

United States Constitution, Amendments I and XIV.

Statement of the Case

On August 23, 1977, Petitioner, the Reverend Louis R. Gigante, an ordained Roman Catholic Priest and, at the time, a New York City Councilman, having been served with a subpoena issued July 29, 1977 directing him to appear and testify on August 24, 1977 before an Extraordinary Special and Trial Term grand jury sitting in New York County, appeared with counsel before the Presiding Justice of that Term in order to argue his earlier interposed motion to quash (R10, R285, R298-339, 2a).* In answer to that motion, a Special Assistant Attorney General had earlier avowed in an affirmation in opposition as follows:

> I am informed and believe that the basis for subpoenaing petitioner before the Grand Jury is the fact that he has information to provide to the Grand Jury which would be helpful to this investigation. More specifically, the Grand Jury has been investigating to determine the nature of the relationship among James Napoli and others designated as organized crime figures, and various public servants including, but not limited to, Father Gigante. The Grand Jury is inquiring into whether petitioner has deliberately abused his position as a public servant by unlawfully interceding on behalf of Mr. Napoli to obtain privileges within the correctional system to which Napoli was not properly entitled, having been designated by the Cor-

* Numerical references preceded by the letter "R" are to the record on appeal before the New York Court of Appeals. Those followed by the letter "a" are to Petitioner's appendix.

> rection Department as an organized crime figure. In this connection I am informed and believe that the Grand Jury has developed evidence from various sources, including Napoli's wife, Jeanne Napoli, who testified that she sought petitioner's intervention and influence to that end. (R292-293).

The court, in response to Petitioner's contentions that the investigation in question may have resulted from an invasion of the statutory "priest-penitent" privilege (R313-314), indicated that no factual basis for such an assertion yet existed and hence, that any questions which would call for the disclosure of confidential communications would have to be confronted on a question by question basis (R315-316).

Upon the court's finding that a good faith basis for the grand jury's questioning existed and the court's concomitant assurance to counsel, pursuant to his request, that the grand jury proceedings would be closely monitored (R303), Petitioner's motion was withdrawn without waiving any future application "of a witness who had been sworn with regard to the relevancy or propriety of questions that are put" (R330, R332, R337).

On August 29, 1977, Petitioner first appeared before the grand jury.* Without recourse to any privilege, Petitioner initially responded to specific questions involving his relationship and dealings with employees and administrators of the New York City Department of Correction, as well as his familiarity with one James Napoli and his efforts to

* In view of the provisions of New York Criminal Procedure Law §190.40(2) (McKinney, 1971), Petitioner received automatic transactional immunity as a result of this initial appearance.

secure for that individual, a prisoner incarcerated from October, 1974 to March, 1975 in institutions under the jurisdiction of that Department, a Christmas furlough and entrance into a work release program (R626-684, 2a). However, when asked if he had had any conversations with Napoli about the conditions under which the latter was serving his sentence, Petitioner, for the first time, refused to answer, asserting a priest-penitent privilege with respect to such conversations (R687-688, 2a).

On August 30, 1977, the Presiding Justice of the Extraordinary Term ruled that such privilege was properly invoked, at least with regard to a general discussion of institutional "conditions" (R377-379, 2a). The court indicated, however, "that a conversation which included the proposition that he should repeat parts of the conversation, at least to the extent that the parts were to be repeated by others, would not seem to me to fall within the privilege" (R377-379).

On September 7, 1977, Petitioner reappeared before the grand jury. While acknowledging having spoken to Napoli and thereupon to one Ralph Grano, an Assistant Deputy Warden, Petitioner, in response to an inquiry as to whether he had spoken to Grano concerning keeping Napoli stationed at the Tombs* as a result of an earlier conversation with Napoli (R727), asserted that:

> I would refuse to answer that question, based upon my privilege, Mr. Keenan, as a priest, but also on the fact that the questions attempt to infringe upon my practicing my ministry, which violates the First Amendment of the Constitution. (R728-729, 2a).

* At the time, an active institution within the New York City Department of Correction.

With respect to additional questions concerning whether he had also interceded on Grano's behalf with Department of Correction personnel, Petitioner claimed that he was relying on his own privilege as a minister as opposed to the privilege he invoked on behalf of Napoli (priest-penitent privilege) regarding his conversations with that individual (R749-751).

Thereafter, on September 9, 1977, Petitioner refused to answer several inquiries upon the ground that the questions asked would involve an infringement on his right to practice his ministry (R774, R776, R779, R782). They included the following:

> Q. Father, were you present at any conversation where other people discussed in your presence smuggling James Napoli, Sr. out of jail at Christmas time in 1975?
>
> Q. Do you recall speaking to Mr. Ford [a Correction Department official] about James Napoli, Sr. and concerning the possibility of Mr. Napoli being put in a work release program?
>
> Q. Do you recall suggesting to Mr. Ford that if Mr. Napoli was not put in a work release program, that you could make things bad for the Correction Department?
>
> Q. Do you recall saying in substance to Mr. Ford, "And if I prove that people have gotten out who are heavy gamblers, who are organized crime what happens then, make a big stink about it? I know a lot of things that have happened that I will not divulge at this time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli."
>
> Do you recall telling that to Mr. Ford?

> Q. During the period of time from October 30, 1974 to March 27, 1975, did you talk to Jesse Harris concerning getting Mr. Napoli in a work release program?
>
> Q. During the period of October 30, 1974 to March 27, 1975, did Jesse Harris refer you to Deputy Commissioner Birnbaum concerning the possibility of getting James Napoli into a work release program?
>
> Q. Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your brother transferred from Rikers Island to a less strict institution in the Department of Correction? (R770-782, 3a).

Subsequently, on September 29, 1977, the parties again appeared before the Presiding Justice. After having read the minutes of the entire grand jury investigation (R459-469), the court concluded that the efforts of the Napoli family and the response of the Correction officials did in fact raise questions of the probability of criminal conduct (R473). With respect to the Petitioner, the court observed that the evidence established that Father Gigante had made inquiries concerning a Christmas furlough and a work release program (R470) and that Petitioner's help had been sought "because he was a public official who might have some impact on the officials in the Department of Correction" (R484)—there having been no indication that Napoli was a member of Petitioner's parish or a person who periodically sought Petitioner's spiritual guidance (R483). Additionally, the testimony of several senior Correction officials established that Petitioner's efforts on behalf of Napoli were not part of a pattern of Petitioner's activities (R486).

The court, upon further eliciting that no evidence indicated any connection between Petitioner and the efforts

of the Napoli family (R473, R475) and that there was no showing of any criminal conduct on Petitioner's part (R475, 3a), nonetheless concluded that the,

> "Grand Jury might reasonabl[y] wish to inquire into the apparent use in part of [Petitioner's] position as a public official on behalf of a prisoner * * *, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment." (R571, 3a).

The court then denied Petitioner's claim of a First Amendment privilege except as to his conversation with Napoli, and directed him to answer questions,

> "relating to either his efforts to secure a furlough or work-release program for Mr. Napoli or as to any knowledge that he may have of preferential treatment that Mr. Napoli received in terms of visitors, food, assignments, [and] work assignments." (R575, 4a).

Petitioner was thereupon directed to respond to those questions which he had earlier refused to answer on the ground that he had a First Amendment privilege (R575, R583, R585-587).*

On November 2 and 16, 1977, Petitioner again appeared before the grand jury. On the November 2 appearance, he refused to answer those questions previously determined by the court to have been proper (R874, R877, R894-895, R899, R903, 4a). In several instances, Petitioner, referring

* The same questions were later incorporated into respondent's predecessor's application to have Petitioner adjudged in contempt pursuant to New York Judiciary Law §§750, 751 (McKinney 1975). That proceeding was initiated by an order to show cause signed by the Presiding Justice on December 13, 1977.

to the fact that some of his conversations had been tape recorded, merely answered that the prosecutor already had the answers to the questions posed (R876, R878, R898); and at other times, he reasserted his claim that the questions infringed on his right to practice his ministry (R888-889, 4a).

On December 16 and 21, 1977, Petitioner reappeared before the court in order to explain why he should not be adjudged in contempt for failure to respond to those questions which on September 29, he had been earlier directed to answer (R53, R94, 4a). Upon stating that he had already answered the questions in prior proceedings (R125-R143) and reasserting his First Amendment privilege as to the subject questions, Petitioner again refused to comply (R177-R178). The court thereupon adjudged Petitioner in contempt for failure to answer the questions reflected in the mandate of commitment of December 29, 1977 (14a), and sentenced him to ten days in jail (R237-238, 6a, 15a).

On appeal, the Appellate Division of the New York State Supreme Court for the First Judicial Department, with one Justice dissenting and one Justice dissenting in part, relying on *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), rejected the claim that Petitioner's refusal to answer was excused by either the First Amendment or any statutory priest-penitent privilege, and affirmed the judgment of contempt in an order entered July 20, 1978 (9a-11a).

Upon a further appeal to the New York Court of Appeals, the order of the Appellate Division was affirmed in an opinion dated May 8, 1979. The court held that the

questions asked did not come within the ambit of the statutory priest-penitent privilege (New York Civil Practice Law and Rules, Sec. 4505 [McKinney 1974]), and that the "constitutional rights claimed by [Petitioner] cannot serve to justify his refusal to answer" (6a), ". . . [Petitioner having] raise[d] no colorable First Amendment right" (7a).

On May 29, 1979, pursuant to respondent's consent, execution of Petitioner's mandate of commitment was stayed by the current Presiding Justice of the Extraordinary Special and Trial Term, pending this Court's review of the instant petition.

Reasons for Denying the Writ

The decision in *Branzburg* v. *Hayes, having been a clear and unequivocal statement of this Court with respect to the availability of constitutional privileges from testifying before *bona fide* grand jury investigations, is completely dispositive of Petitioner's contentions. By relying upon that precedent in affirming Petitioner's adjudication of contempt, the courts of New York correctly applied the controlling law.**

Petitioner, Louis R. Gigante, having been adjudged in contempt for refusing to answer questions as a grand jury witness upon the assertion of certain statutory and constitutional privileges, was twice unsuccessful in attempting to overturn that judgment in the appellate courts of New York.

* 408 U.S. 665 (1972).

Both the Appellate Division and the Court of Appeals held that this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 667 (1973) was dispositive of Petitioner's claim and that any reliance on a "free exercise of religion" privilege must yield to the compelling state interest which inheres in a *bona fide* grand jury investigation. Since therefore, the holdings of those two courts, as well as that of the Presiding Justice at Extraordinary Term, were predicated —as to the constitutional point raised herein—on sound and unequivocal conclusions previously reached by this Court, there is absolutely no "special and important reason" (Rules of the Supreme Court of the United States, Rule 19, para. 1) why a writ of certiorari should issue at this time.*

* It should be noted at the outset that Petitioner's current application, out of obvious necessity, has been divested of the cloak of state statutory considerations which enveloped it in the Court of Appeals. In his brief in that court, Petitioner argued that "There is no generalized citation to the First Amendment, but one made in the context of a recognized privilege in the State of New York [i.e., New York Civil Practice Law and Rules §4505 (McKinney 1974)]" (brief of appellant, Reverend Louis R. Gigante in New York Court of Appeals at p. 30). What Petitioner was attempting to do in so asserting was to revise his position from that which he had unsuccessfully urged in the Appellate Division and at *nisi prius,* which was that the statutory privilege and the First Amendment considerations were distinct concepts and were hence, only in the alternative, dispositive of his contentions. The intermingling of these concepts in the Court of Appeals as noted above, also met with little success.

Consequently, having not fared well at this amended approach either, and in order to re-tailor his argument to comport with 28 USC §1257(3), all reliance upon this intertwined concept of the state statutory priest-penitent/First Amendment privilege has been discarded. Petitioner has thus arrived full circle and has now returned to the alternative approach which he pursued during the course of the grand jury proceedings and through the litigation in the Appellate Division.

A.

Generally speaking, *Branzburg* reaffirmed that,

> . . . [T]he longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common law or statutory privilege, *United States* v. *Bryan,* 339 U.S. 323, 331 (1950); *Blackmer* v. *United States,* 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence §2192 (McNaughton Rev. 1961), is particularly applicable to grand jury proceedings (*Branzburg* v. *Hayes,* 408 U.S. 665, 688 [1972]).

See also, People v. *Woodruff,* 26 A.D. 2d 236, 238-239, 272 N.Y.S. 2d 786 (2nd Dept. 1966), *aff'd* 21 N.Y. 2d 848, 288 N.Y.S. 2d 1004 (1968).

In this regard, it was at the same time made clear that "until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination" (408 U.S. at 689). While so instructing, this Court, quite unmistakeably, declined any invitation to create another.

B.

In *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304 (1940), the Court, concerning itself with the First Amendment's freedom of religion provisions, took occasion to note that,

> . . . [T]he amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Hence, in the "free exercise" area, regulation of conduct is warranted since, in the absence of some degree of constraint, an absolute rule would allow "every man, priest or minister, to become a law unto himself" *Reynolds* v. *United States,* 98 U.S. 145 (1878).

In light of the gravity of the free exercise concept, however, especially as regards the individual's right to pursue his beliefs in an unfettered manner, a formula for regulation was settled upon. Thus, in *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963), this Court reiterated the longstanding principle that restrictions on the free exercise of religion—as, indeed, on all First Amendment rights—may only be called for in the face of a " 'compelling state interest in the regulation of a subject within the state's constitutional power to regulate' " (Citing *NAACP* v. *Button,* 371 U.S. 415, 438 [1963]). *See also, Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972); *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825 (1966); *Bates* v. *City of Little Rock,* 361 U.S. 516, 524 (1960); *NAACP* v. *Alabama,* 357 U.S. 449, 464 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); and *Schneider* v. *New Jersey,* 308 U.S. 147, 161 (1939). Therefore, in applying the formula it becomes necessary to ". . . balance, then, the interest of the individual right of religious worship against the interest of the State which is sought to be enforced." *People* v. *Woodruff, supra,* 26 A.D. 2d at 238, 272 N.Y.S.2d at 789.

C.

Concerning this case, a compelling interest on the part of the state has been held to clearly exist in regard to the issuance of subpoenas by duly authorized grand jurys conducting *bona fide* investigations. Said the court in

Branzburg, in the face of the assertion by various newsmen that the burden on news gathering, and thus upon the freedom of the press, resulting from compulsory testimony required a constitutional privilege for them:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence (408 U.S. at 682).
>
> . . . The investigation of a crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . (408 U.S. at 700).

Without doubt, is the fact that the "free exercise" clause of the same amendment is treated on an equivalent plane. *See In Re Possible Violations of 18 USC §§371, 641, 1603 (Maren)*, 564 F.2d 567 (D.C. Cir. 1977); *Smilow* v. *United States*, 465 F.2d 802 (2nd Cir. 1972), *vacated on other grounds*, 409 U.S. 944, *remanded*, 473 F.2d 1193 (2nd Cir. 1973).

It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's "compelling interest."* (See also *In*

* Significantly, Petitioner's discussion of the balancing of interests in the "free exercise" area is marked by reference only to cases not involving the concepts of grand juries and the overriding public functions which they serve (see Petition at pp. 8-10).

Furthermore, Petitioner's reliance on Mr. Justice Powell's concurrence in *Branzburg* (Petition at p. 13) in support of the availability of some redress for the newsmen in that case sidesteps the

(footnote continued on next page)

Re Rabbinical Seminary, 450 F.Supp. 1078, 1083 [E.D.N.Y. 1978]; *Matter of Wood*, 430 F.Supp. 41, 47 [S.D.N.Y. 1977].)

It follows, that the Court of Appeals and the Appellate Division, in rejecting Petitioner's assertion of constitutional privilege, were ruling in complete accord with well entrenched law.

D.

Lastly, Petitioner's suggestion that this case is unlike *Branzburg* since in that matter the reporters had ". . . argued that it was incumbent on the grand jury seeking their testimony to first exhaust any available alternative means available [sic] to garner similar information" (Petition at p. 12), is curious indeed. For throughout the state appellate process as well as in the initial portion of his petition (see Petition pp. 8-9), Petitioner's argument was and is bottomed on *that precise premise*—that the grand jury possessed alternative means and, as a consequence, had recourse elsewhere thereby detracting from its interest in securing his personal testimony.

---

point. Undoubtedly, Justice Powell only stated that the reporters therein did indeed have remedies when "grand jury investigations were not being conducted in good faith" (408 U.S. at 710). See *Maren, supra*, at pp. 570-571; *Matter of Wood*, 430 F.Supp. 41, 47-48 (S.D.N.Y. 1977); *cf. United States* v. *Dionisio*, 410 U.S. 1, 12 (1973). In view of the exhaustive findings of the court at Extraordinary Term as to the propriety of the grand jury inquiry in the matter *sub judice*, however, such a result is not obtainable herein.

Moreover, this conclusion is only heightened by the fact that the answers requested of Petitioner—even if the privilege which he espouses would exist—had nothing to do with the practice of his ministry but only with respect to actions he had taken as a friend and influential public official. For Petitioner to assert the contrary, is to raise a factual question which the courts below declined to reach.

To the extent, therefore, that Petitioner does maintain reliance on the suggested need for consideration of separately available evidence (see Petition, bottom p. 8), such argument has quite emphatically been proposed and rejected. As this Court also concluded in *Branzburg*:

> [S]imilar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, *for only the grand jury itself* can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia,* 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F.2d 138, 140 (2nd Cir. 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States,* 350 U.S. at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . ." (408 U.S. at 701-702) (emphasis supplied).

Further, see *Maren, supra,* 564 F.2d at 570, a "free exercise" case ignored in the petition for certiorari, where, in

response in part to this very claim that *Branzburg* in fact presented a test involving just such an "alternative source" criterion, the Court emphasized that,

> The *Branzburg* majority, however, rejected that formulation in clear and unmistakeable terms.

All things considered, in regard to pure First Amendment theory, as the court below concluded, the *Branzburg* opinion wrought utter destruction upon the position which Petitioner espouses herein. There, the reporters had pleaded that if they were forced to appear their sources would lose confidence in them and would as a consequence be no longer willing to confide thereby "chilling" their First Amendment freedom to gather news. Here, Father Gigante's argument is predicated on the pure hypothesis that if he is compelled to testify he will lose "penitents" who would henceforth be unwilling to approach him, thereby "chilling" his ability to minister—a suggested infringement of a First Amendment right within the "free exercise" clause. The *Branzburg* Court's response, however, is equally applicable; no such privilege exists *vis-a-vis bona fide* grand jury investigations (see also, *Woodruff, supra; Smilow, supra; Maren, supra*).

Accordingly, it is respectfully submitted, that since it cannot be said that the New York Court of Appeals ". . . has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court" (Rules of the Supreme Court of the United States, Rule 19, para. 1[a]), any further hearing of this case is unnecessary and would assuredly only result in an affirmance.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August, 1979

Respectfully submitted,

RODERICK C. LANKLER
Deputy Attorney General
Special State Prosecutor
2 World Trade Center
New York, New York 10047
(212) 466-1250
Respondent Pro Se

MARK M. BAKER
THOMAS A. DUFFY, JR.
Special Assistant Attorneys General
Of Counsel

IN THE
Supreme Court of the United States
October Term, 1978
No. 79-194

REVEREND LOUIS R. GIGANTE,
Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

BARRY IVAN SLOTNICK
Attorney for Petitioner
233 Broadway
New York, N.Y. 10007
(212) WO 4-3200

JAY L.T. BREAKSTONE
Of Counsel

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TELEPHONE: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

-against-

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY MEMORANDUM

The only important point in respondent's brief, from the standpoint of whether this Court should grant a Writ of Certiorari, is his interpretation of the scope and significance of this Court's holding in *Branzburg v. Hayes,* 408 U.S. 665 (1972). What he contends about *Branzburg* amounts to a convincing argument in support of the petitioner's request that the writ be granted.

On Page 12 of his brief, respondent reads this Court's majority opinion in *Branzburg* as if it held that the only testimonial

privilege for unofficial witnesses this Court will ever recognize is the Fifth Amendment privilege against compelled self-incrimination, and as if it meant that this Court would not recognize another one under any circumstances, either for newsmen or anyone else. In that vein, the respondent, on page 14 of his brief, states:

> "It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's 'compelling interest'."

This plainly means that, unless this Court grants a Writ of Certiorari, the New York Court of Appeals holding in this case, and the declination of this Court to grant review, will be interpreted by the respondent and all other Federal and State prosecutors in the nation as a green light to override the First Amendment rights of all witnesses called before a grand jury, without any need for a balancing test, regardless of the circumstances. The single exception to the sweeping rule that respondent argues for would be where a witness is able to carry the virtually unsupportable burden of demonstrating that the grand jury is proceeding in bad faith.

We ask that this Court take the opportunity to make a further statement about testimonial rights under the First Amendment that will put its *Branzburg* holding in proper focus for those who, like the respondent, seem to be seriously misinterpreting it. The long-term prejudicial impact upon clergymen will be incalculable.

Lastly, petitioner finds it necessary to clarify a critical point: there has been no doubt shed as to the petitioner's contention that his testimony before the grand jury was purely repetitive and totally unnecessary when compared with the more direct and accurate evidence the grand jury *already possessed.*

Respondent, therefore, misses the point when he suggests that petitioner "curiously" finds the within case dissimilar in this respect from *Branzburg*. *Brief in Opposition* at 15. What the *Branzburg* majority rejected was the shifting of the burden upon the grand jury to go out and seek and exhaust all alternative sources. In the case at bar, it was *petitioner's* testimony that was unnecessary in light of highly accurate evidence *already possessed* by the grand jury (i.e. tape recordings of petitioner's voice). What the grand jury was requesting, quite simply, was the petitioner to re-create those very recordings in narrative fashion. In this sense, the "alternative sources" element of *Branzburg* is not present in the matter *sub judice.*

SUMMARY

The importance of the matters raised herein to clergy and communicants cannot be underestimated, as the *amicus* brief accurately points out. Moreover, the ease with which the Court's holding in *Branzburg* has been extended into an area so jealously guarded from unnecessary governmental intrusion portends even greater concerns in the future lest review be granted.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, New York
August, 1979

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Petitioner
233 Broadway
New York, N.Y. 10007
(212) WO4-3200

JAY L. T. BREAKSTONE
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, Deputy Attorney General of the State of New York, Special State Prosecutor,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SAMUEL H. DAWSON
Attorney for the Central Rabbinical Congress of the United States and Canada
305 Madison Avenue
New York, New York 10017
Telephone: (212) 682-0810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, Deputy Attorney General of the State of New York, Special State Prosecutor,

Respondent.

Motion for Leave to File a Brief *Amicus Curiae* in Support of the Petition for a Writ of Certiorari.

The Central Rabbinical Congress of the United States and Canada (hereinafter referred to as the "Rabbinical Congress"), hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the New York Court of Appeals.

The consent of the Petitioner has been obtained. In response to a request for his consent, the Respondent has advised that he will take no position on that question. The letters from the attorneys for the parties have been filed with the Clerk of this Court.

The Rabbinical Congress was established in New York State in 1953. The Congress is comprised of over two hundred and fifty rabbis tending to the needs of approximately five hundred thousand orthodox Jews living in the United States and Canada. The Rabbinical Congress came into being after the Holocaust, in order to assist the dispersed survivors of the pre-war European communities in re-establishing themselves in their traditional Jewish way of life and custom. Moreover, the Rabbinical Congress was designed to serve as a key mechanism in the propagation of Jewish orthodoxy through the creation of a Bais Din, or Rabbinical Court. The primary function of this Rabbinical Court is the elucidation of Talmudic law.

The paramount interest of the Rabbinical Congress in this case stems from the fact that if the New York Court of Appeals' decision were allowed to stand, serious consequences would befall not only Father Gigante, but clergymen of all faiths and the congregations that they serve. By permitting virtually unlimited questioning into the workings of the Petitioner's ministry, the New York Court of Appeals relegated the freedom of religious exercise to a least preferred position vis-a-vis the grand jury and, most importantly, failed to define the permissible limits of such an inquiry in the context of the First Amendment to the United States Constitution.

This case is also of importance to the Rabbinical Congress owing to the fact that the Congress' Rabbinical Court was recently called upon to issue a ruling as to whether two of its affiliated rabbis could testify before a New York State grand jury that was inquiring into the sources of charitable contributions given to the rabbis for their synagague. The proposed questioning was also to explore the uses to which their monies were put in the operation

of the temple's various programs. Similar to the situation that confronted Father Gigante, these rabbis were to be probed about conversations and activities that transpired between them and members of the community to whom they minister. Again, as this *amicus curiae* reads the opinion of the Court of Appeals in Petitioner's case, the holding of that Court categorically rejected the view that the First Amenment affords Petitioner *any* protection against the intrusive inquiry of the grand jury. We are fearful, therefore, that these rabbis will fare no better than Father Gigante did in the New York courts, and thus they face the wrenching dilemma of choosing between commitment to prison or turning their backs upon their ministry.

Given the need to properly define not only the reach of a grand jury's power when it trenches upon a freedom of the first magnitude, but also the appropriate role of lower courts in their supervision of such a grand jury, it is respectfully suggested that the attached brief might be of assistance to this Court in deciding whether to grant the Petitioner's application for a writ of certiorari.

WHEREFORE, the Rabbinical Congress prays that this Court grant it leave to file the attached brief *amicus curiae*.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

SAMUEL H. DAWSON
Attorney for the Central Rabbinical Congress of the United States and Canada
305 Madison Avenue
New York, New York 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, Deputy Attorney General of the State of New York, Special State Prosecutor,

Respondent.

BRIEF AND APPENDIX OF THE CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES AND CANADA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SAMUEL H. DAWSON
Attorney for the Central Rabbinical Congress of the United States and Canada
305 Madison Avenue
New York, New York 10017

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, Deputy Attorney General of the State of New York, Special State Prosecutor,

Respondent.

BRIEF OF THE CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES AND CANADA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Introductory Statement

The essential facts of record in this case, the provision of the United States Constitution involved, the pertinent New York statutory provision and the opinions of the courts below are set forth in the Petition for a Writ of Certiorari to the New York Court of Appeals. We accept them for the purpose of this brief.

Interest of the *Amicus Curiae*

The Rabbinical Congress is comprised of several hundred rabbis who tend to the spiritual needs of hundreds of thousands of congregants. These rabbis, in turn, are responsible for the administration of synagogues, religious schools and colleges, children's camps, and a myriad of programs dealing with the medical, financial and housing needs of the large orthodox Jewish population that resides throughout North America, and particularly in New York State. Like the Petitioner, many of the rabbis affiliated with the Rabbinical Congress extend their ministry beyond the simple walls of their temples. Thus, their calling takes them into environments where individuals are tended to in old age, in sickness, in conflict with the law and the seemingly boundless social service programs that are indigenous to a modern society.

Recently, two rabbis affiliated with the Rabbinical Congress were subpoenaed to testify before a New York grand jury looking into the sources of charitable contributions to their synagogue and the uses to which the money was put. The Congress, through its Rabbinical Court, issued a decree forbidding the rabbis to testify because to do so would sanction an intrusion into the most sacred domain of the exercise of a ministry. Annexed to this brief is a copy of the full text of the decree explaining the rationale of such preclusion.

The New York Court of Appeals' decision rejects the First Amendment as a protection against such a wide ranging and damaging inquiry and, rather, declares that the sole protection afforded a clergyman is that accorded by a priest-penitent privilege statute. We submit that the Court of Appeals was wrong in so holding and the issue

should be settled by this Court. Moreover, we believe that the remedy proposed later in this brief will afford a grand jury the due latitude it needs to conduct an appropriate investigation into criminality, while at the same time assuring that any intrusive questioning into the exercise of a religious ministry is warranted.

Question Presented

We submit that the appropriate question presented by this case is:

> Where a grand jury seeks the compelled testimony of a clergyman, and a particularized claim of First Amendment protection has been interposed by the minister, should a court in its role as supervisor of the grand jury require the prosecution to demonstrate that the testimony sought is essential to the justice of the case, with the balance being struck in favor of the minister when the essence of the testimony already exists in otherwise admissible forms from other sources available to the grand jury?

Argument

We respectfully submit that there are several persuasive reasons for the granting of Petitioner's application for a writ of certiorari.

I. This case demonstrates the need for guidance to lower courts when they are called upon to weigh the competing interests of a grand jury and a minister.

The Court of Appeals, in relying upon the "enduring command that every man owes a duty to society to give evidence when called upon to do so," concluded that Petitioner raised "no colorable First Amendment right." This *amicus* believes that the application of such an "enduring command" in the kneejerk fashion that was employed herein was plainly wrong. As it has been noted, "a grand jury subpoena is [not] some talisman that dissolves all constitutional protections." *United States* v. *Dionisio,* 410 U.S. 1, 11 (1973).

The New York courts concluded that this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), precludes any balancing of the sometimes conflicting interests of an investigatory grand jury and the exercise by a clergyman of his ministerial duties. As Mr. Justice Powell observed in his concurrence in *Branzburg*:

> "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order

> may be entered. *The asserted claim to privilege should be judged on its own facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Branzburg, supra,* at 709-710. (Emphasis added) (footnotes omitted).

Certainly, the values and interests embodied in the First Amendment's free exercise clause demand no less protection than that afforded a newspaperman. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Simply put, the Court of Appeals opined that in view of *Branzburg's* dictates, no balancing of interests was required. This was wrong. The Respondent has asserted that a balancing test should be employed in such situations as presented herein, but his notion of balance is more fiat than careful weighing of interests. He claims:

> "It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's 'compelling interest.'" Respondent's Brief in Opposition, at page 14. (Emphasis in original).

Such an assertion turns "balancing" on its head. It reads out of *Branzburg,* the important concurrence of Mr. Justice Powell. Accordingly, if the Respondent's view were to prevail—as it apparently has through the New York courts—the *mere* empanelling of a grand jury de-

feats *ipso fatco any* and all First Amendment claims. Such a rule would shield from scrutiny claims of harassment, bad faith and encroachment onto protected areas. Moreover, it does violence to this nation's firmly held ideal that matters of religious exercise are beyond the concern of government. It would read out of the constitution the wide latitude accorded religious ministries and turn its back on the centuries of historical conflicts that the First Amendment was designed to prevent from occurring in this country.

II. This case will provide this Court with an opportunity to fashion a remedy that will minimize clergyman-grand jury conflicts, while according to each the sufficient latitude necessary to carry out their respective functions.

We respectfully call to the Court's attention the case of *United States* v. *Nixon*, 418 U.S. 683 (1974). There, in response to a subpoena duces tecum calling for certain material, the President of the United States interposed an objection premised upon a claim of executive privilege. In passing upon such claim, this Court noted that while the President must rely on free and robust advice given to him by his confidential advisors in order to conduct this nation's most sensitive affairs, it was also true that this country's commitment to the rule of law requires, in the context of the criminal justice system, an availability of information to ensure that justice for the guilty and the innocent is surely done. The Court concluded that it was, therefore, necessary to resolve these competing interests in such manner as would preserve the essential requirements of both the Executive Branch and the judicial system.

While eschewing the existence of an absolute executive privilege to withhold evidence from the judicial system, this Court nonetheless held that the President enjoys a qualified privilege that presumptively attaches to Presidential communications. *United States* v. *Nixon, supra,* at 708. This Court went on to hold:

> "We conclude that when the ground for asserting the privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. *The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."* *United States* v. *Nixon, supra,* at 713.

In *Nixon,* the Court set forth the manner in which a District Court should treat such a claim of privilege. If a privilege is asserted by the President, it is the duty of the court to consider the material sought as presumptively privileged. The burden is then on the prosecutor to demonstrate that the material sought is essential to the justice of the case. Courts are not unused to such procedure. Indeed, it is often a commonplace in the context of grand jury investigations that subpoenas duces tecum are challenged on grounds of reasonableness, relevance and burdensomeness. *E.g.,* Rule 17(c), Federal Rules of Criminal Procedure.

The procedure outlined in *Nixon* should apply with equal force and facility in the case before the Court. In New York, trial courts act in a supervisory capacity over the grand juries that are locally empanelled. *See generally,*

New York Criminal Procedure Law Article 190 (lower courts empanel the grand jury; appoint its foreman; swear the panel; provide it with instructions as to the proper performance of its duties; control the release of grand jury materials to third parties; pass upon all challenges to subpoenas; and generally act as the jury's legal advisor). It is respectfully suggested that the analogous remedy fashioned in *Nixon* should be carried forward to situations involving clergymen witnesses. Otherwise, *Branzburg* will be given the wooden application contended for by the Respondent and apparently applied by the New York courts. Application of the remedy suggested herein would allow the Respondent to make a showing of demonstrated, specific need and permit the supervisory court to undertake a careful review culminating in specific findings of fact that may then be examined should Petitioner remain in contempt.

CONCLUSION

The *amicus curiae* asks, therefore, that this Court grant the petition for a writ of certiorari to the New York Court of Appeals.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

SAMUEL H. DAWSON
Attorney for the Central Rabbinical Congress of the United States and Canada
305 Madison Avenue
New York, New York 10017

APPENDIX

CENTRAL RABBINICAL CONGRESS OF THE U.S.A. AND CANADA
85 DIVISION AVENUE BROOKLYN, N.Y. 11211

EV 4-6765-6

March 19, 1979

INTRODUCTION

We are called to issue a ruling as to whether two Rabbis, who have been subpoenaed to testify before a grand jury in the State of New York, should be permitted to testify before that body concerning conversations they had with members of their Congregations; acts which followed those conversations; and the financial operations of the Bobover Yeshiva.

We have been informed that the grand jury seeks to inquire into the functioning of the Bobover Yeshiva. Specifically, the grand jury will inquire into the sources of charitable contributions; its methods of collecting these contributions, and the use to which these monies were put in the religious operations of the Yeshiva.

We have been informed that part and parcel of this inquiry will be an attempt to probe conversations and activities of the Rabbis which transpired between them and the members of the community to whom they minister.

While we recognize the obligations of every individual to cooperate with the secular authorities, we are not unmindful that a very grave situation arises when that obligation clashes with the beliefs of an individual who has dedicated his life to the following of deeply held religious precepts.

The situation reaches the critical stage when the individual is a Rabbi who serves as spiritual and religious advisor to a congregation whose very existence is premised upon their unyielding belief in the rectitude and piety of their spiritual advisors. It is precisely this situation with which we are confronted.

I

•

If the Rabbis were forced to testify before the grand jury, we foresee irreparable and immediate injury befalling both the Rabbis and the community which they serve and to whom they have dedicated their lives.

To testify would, in effect, be to surrender the ministry and the obligations of spiritual advisor which each Rabbi has undertaken. If the Rabbis were to testify, they would betray the trust and sacred confidence that the community has placed in them. They would be forever torn from this position of trust and confidence and could no longer function as teachers, spiritual advisors, Rabbis, or leaders of their congregation.

Moreover, the community as a whole would suffer an even greater and more devastating injury. Each of these Rabbis plays a significant and crucial role in ministering to the Bobover community. The Bobover hassidic community is an insular community where religious instruction, prayer, and devotion is the singular and paramount concern of each of its members. To deprive this community of their chosen religious leaders would be to set the community hopelessly adrift.

If these Rabbis testify, the members of the congregation cannot help but call into question the integrity of all of their rabbis and teachers. The sanctity of the religious

leaders, who guide and educate this community, will be seriously and irrevocably demeaned if the confidence of these leaders can be subjugated to the demands of the grand jury.

If the Rabbis were to testify, the delicate fabric of reliance by the congregation upon the religious leadership, from whom they draw their sustenance, would be torn asunder. Throughout history the hassidic community in Europe, in the concentration camps, and now in the United States has sought from their Rabbis guidance, learning, leadership, and religious training. The Bobover community is guided by the teaching of their Rabbis in all they do. Irrefutably, loss of this leadership and direction will be a real and immediate consequence if the Rabbis are to testify before the grand jury. Thus, the necessity to avoid this consequence surely outweighs any benefit that would occur through their testimony.

II

••

It cannot be denied that if the Rabbis' position were that of an observer of a crime or a victim of criminal conduct, they would, of necessity, fall under the dictates of secular laws and would testify without recrimination or reservation in any proceeding; for to disclose this information and the acts that followed from this information would do no violence to their rabbinical role.

But the situation with which we are faced is not at all that described above. The very nature of the inquiry are those matters which these men saw or heard or learned about because of their rabbinate. Their very position as Rabbis enabled them to gain this information, and this position of absolute trust prohibits them from testifying.

The Yeshiva is the cornerstone of the entire life of the community. It depends entirely for its existence upon the charity of its members. The Rabbis cannot divulge who donated money to the Yeshiva, the methods of such donations, and the use to which the money was put. To do so would have a chilling effect upon those who would wish to support the Yeshiva. Moreover, the very act of giving is a requirement of our religion. Disclosing these donations and the motivations behind them, e.g., atonement or penance, would make this religious act impossible to perform and subject to impermissible outside scrutiny.

The Rabbis must do everything possible to preserve their cherished role as spiritual advisors and guardians of their community. They can do nothing which would do violence to this position. The only manner in which they can avoid this injury, i.e., this destruction of their role as Rabbis and spiritual leaders of their congregation, is to refuse to testify. It is the only path which would be acceptable to their congregation and the only avenue available.

Conclusion

••••••••••••

It is indeed necessary that the Rabbis not testify to the matters set forth above. The total and unyielding commitment which the Rabbis have given to the hassidic community, to their religion, and to their ministry outweighs, in this instance, any material benefit which would accrue to the civil authorities.

We so direct because we are fearful that by testifying, they would breach the most sacred of confidential relationships or would give the appearance of breaching this relationship.

We direct the Rabbis not to so testify for it is the only course which will preserve the very nature and integrity of the religious community to which they have dedicated their lives.

Central Rabbinical Congress
of the U.S.A. and Canada
/s/ Rabbi M. Berkowits
Rabbi M. Berkowits
Executive Director

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE X. CUSACK
JOSEPH E. MOUKAD
Attorneys for Roman Catholic Archdiocese of New York, Amicus Curiae
61 Broadway
New York, N.Y. 10006
Telephone: 212-480-0400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,
Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Roman Catholic Archdiocese of New York (hereinafter referred to as the "Archdiocese") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the New York Court of Appeals.

The consent of the Petitioner has been obtained. In response to a request for his consent, the Respondent has advised that he will take no position on that question. The letters from the attorneys for the parties have been filed with the Clerk of this Court.

The interest of the Archdiocese in this case arises immediately from the fact that the Petitioner is an ordained priest of the Archdiocese. He has been adjudged guilty of

criminal contempt and sentenced to jail for ten days for his refusal to answer certain questions put to him when he appeared as a witness before a New York grand jury investigating certain alleged crimes.

Less immediate, but nevertheless of paramount interest to the priests, religious and laity of the Archdiocese, is the important issue of religious freedom raised by the action of the New York courts in rejecting the Petitioner's invocation of the religion clause of the First Amendment. He had declined to answer on the ground that the questions propounded to him concerned acts performed by him in the exercise of his religious ministry and were, on the facts of this case, an unnecessary interference with the free exercise of his religion, since his answers were not needed to advance the grand jury's investigation.

The limitations, if any, on a grand jury's right to elicit the testimony of a clergyman as to actions taken in the practice of his ministry is a subject of deep concern to men and women of all faiths engaged in the performance of religious ministry and to the millions of Americans they serve. It is also a matter of great importance to Federal and State grand juries and prosecutors throughout the land to have the limits, if any, on a grand jury's right in such circumstances settled.

New York's Court of Appeals held that the Free Exercise Clause of the First Amendment imposes no limitation on a grand jury's right that is broader than the statutory priest-penitent privilege. The importance of settling the issue raised by that holding is dealt with in greater detail in the attached brief.

In this case of first impression, it might be helpful to this Court to consider the attached brief in deciding whether Petitioner's application for a writ of certiorari should be granted.

WHEREFORE, the Archdiocese prays that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

LAWRENCE X. CUSACK
JOSEPH E. MOUKAD
Attorneys for Roman Catholic Archdiocese of New York
61 Broadway
New York, N.Y. 10006

August 10, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,
Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,
Respondent.

BRIEF OF ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE X. CUSACK
JOSEPH E. MOUKAD
Attorneys for Roman Catholic Archdiocese of New York, Amicus Curiae

61 Broadway
New York, N.Y. 10006
Telephone: 212-480-0400

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,
Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,
Respondent.

BRIEF OF ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introductory Statement

The essential facts of record in this case, the provision of the United States Constitution involved, the pertinent New York statutory provision and the opinions of the Court below are set forth in the Petition for a Writ of Certiorari to the New York Court of Appeals. We accept them for the purpose of this brief.

Interest of the *Amicus Curiae*

The Archdiocese of New York is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the County of New York and in nine other counties of the State

of New York. It is administered by the Archbishop of New York, His Eminence Terence Cardinal Cooke, who exercises authority over more than 2,000 diocesan and religious priests and more than 6,000 religious sisters and brothers, serving an area with a total population of more than 5,000,000 of whom approximately 1,800,000 are Catholics.

The Petitioner herein is an ordained priest of the Archdiocese. For many years after his ordination he visited prisons in New York City, ministered to prisoners, talked to people in the prison system and became interested in prison reform. He served on the City Council from 1974 through 1977.

In 1977, the Petitioner testified as a witness before a grand jury held in and for the County of New York, which was investigating whether certain crimes had been committed by officials or other employees of the New York City Department of Correction or by private citizens. A series of questions was put to him that centered around visits that the Petitioner had made to a prisoner in 1974 and 1975 and to conversations the Petitioner then had with officials of the City Department of Correction.

The Petitioner was sustained by the presiding Justice (hereinafter referred to as the "Trial Court") in his refusal to answer certain of the questions on the ground that they related to confidential communications with the prisoner that were protected by the statutory priest-penitent privilege. There were five other questions, all concerning his conversations with prison officials after visiting the prisoner. The Petitioner declined to answer them on the ground they were a needless intrusion on his constitutionally protected right to the free exercise of his religious ministry.

The Trial Court found that there was no indication that the Petitioner had significant evidence of criminal activities which was important for the grand jury to have, that

there were doubts whether the testimony of the witness would contribute significantly to the discovery of crime, that the prosecutor already had on tape, and in typewritten transcripts, the information about which the Petitioner was being questioned, and that there were alternative sources of information available to the grand jury. Nevertheless, the Trial Court adjudged the Petitioner guilty of criminal contempt for his refusal to answer those questions and sentenced him to ten days in jail. That judgment was affirmed on July 20, 1978 by a decision of the Appellate Division of the Supreme Court of the State of New York, First Department and on May 8, 1979 by a decision of the New York Court of Appeals.

In its opinion, the New York Court of Appeals held that the Petitioner had raised "no colorable First Amendment right", reasoning that "the statuory privilege . . . affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute . . .".

The important issue of the nature and scope of a clergyman's constitutional right to the free exercise of his ministry, when appearing as a witness before a grand jury, is a matter of deep concern to the clergy, religious and laity of the Archdiocese of New York. For reasons appearing later in this brief, we believe that issue is also a matter of interest to all religious ministers in our country, regardless of the religious faiths that they profess, to all citizens of the United States to whom they minister, and to Federal and State grand juries and prosecutors in all jurisdictions of the nation.

The holding of New York's Court of Appeals in this case that the First Amendment has no application raises a substantial question of first impression that should be settled by this Court.

Question Presented

The Petitioner is not contending that his religious ministry gives him a blanket privilege against testifying at all, or that a clergyman has a general right to resist all questioning until the Government satisfies certain conditions. He does not, moreover, argue for a right that extends beyond information obtained in the course of his religious duties, nor for an absolute right even as to such information, but merely for the application of a balancing test such as this Court has applied in other contexts. Finally, the Petitioner does not contend that a clergyman can ever rely upon his status as a religious minister to shield his own unlawful activities, except to the extent that he might invoke the Fifth Amendment privilege against self-incrimination.

Petitioner's contention before the New York Courts that the unanswered questions for which he was adjudged guilty of contempt intruded upon the statutory priest-penitent privilege was rejected by the New York Court of Appeals and it is, therefore, no longer an issue in this case.

The issue in this case arises by reason of Petitioner's alternative contention in the New York Courts that those questions related to acts performed by him in the exercise of his ministry, that to answer them would intrude upon the free exercise of his religion, and that the application of a balancing test to the particular facts and circumstances of his case would show that the grand jury did not have a compelling need for his testimony. The New York Court of Appeals rejected that contention because it raised "no colorable First Amendment right".

Accordingly, we believe that the only question presented by this case is:

> Does a clergyman, testifying as a witness before a grand jury, who is asked questions about acts performed in carrying out his religious ministry, other than those protected by a statutory priest-penitent privilege, have a right under the Free Exercise Clause of the First Amendment to require the presiding judge to apply a balancing test in deciding whether, under the particular facts and circumstances, the grand jury's need for his testimony is so compelling that it outweighs his First Amendment right?

The record shows that the Trial Court ordered the Petitioner to answer even after having found, as appears in greater detail below, (i) that there was no indication that he had significant evidence of criminal activities which was important for the grand jury to have, (ii) that there were doubts whether the testimony of the witness would contribute significantly to the discovery of crime and (iii) that there were alternative sources of information available to the grand jury.

Argument

We respectfully submit that there are several persuasive reasons for the granting of the Petitioner's application for a writ of certiorari.

I. This case presents an issue of religious freedom that is fundamental

This Court has often said that the right to the free exercise of one's religion is one of the most important rights granted by the United States Constitution. It is difficult to imagine a more fundamental issue of religious freedom than the right of a clergyman, whether he be priest, rabbi or minister, to carry out his religious activities free from unnecessary governmental intrusion.

This case presents a clear instance of unnecessary intrusion. A clergyman is called as a witness before a grand

jury to testify about his visits to a prisoner and his talks with prison officials. He does not decline to appear on the ground that he has a special immunity as a clergyman. He does not invoke a general privilege against testifying. In fact, he willingly testifies about matters that do not involve confidential aspects of the exercise of his ministry. He does, however, decline to respond to questions about communications with the prisoner to whom he was ministering, and, as to them, his claim of statutory privilege is upheld. He refuses also to answer questions about his conversations with prison officials after having visited the prisoner, and asserts that to answer would violate the confidentiality of his relationship with the prisoner, be contrary to a fundamental principle of his ministry, and create a serious impediment to the effective exercise of his ministry in the future. He points out that the prosecutor already has tapes of his conversations, states that he has no knowledge of illegal activities and claims that the grand jury has alternative sources of information.

The grand jury, the prosecutor, and the presiding judge especially, assuming them all to be citizens resolved in conscience to observe the dictates of our Constitution, are thereby confronted with a serious issue of religious freedom. Must the clergyman's right to the free exercise of his ministry be respected to the extent of according him an absolute privilege against testifying about acts performed in the course of his ministry? Or, on the other hand, is the interest of the grand jury in carrying out its important responsibility of investigating crime so absolutely compelling that the First Amendment rights of the clergyman must be overridden without further inquiry? Is there, however, a middle ground? Is the presiding judge, as a sworn guardian of the constitutional rights of all citizens, obliged to look into the facts and circumstances of the particular case and to strike a balance between the constitutionally protected right of the clergyman and the interest of the grand jury in requiring his testimony?

The last of these questions frames the important issue of religious freedom that this case presents. We believe that no clear answer to it has yet been given by this Court.

II. The question raised by this case is of national interest

The answer to the question in this case will have an impact on the religious ministry of tens of thousands of clergymen of all religious faiths and on their spiritual relationships with the millions of Americans to whom they minister. According to the latest available data, based on reports from 223 major religious bodies in the United States, the number of clergymen in this country exceeds 479,000 and they serve a combined church membership that exceeds 131,000,000. *Yearbook of American and Canadian Churches 1978* (National Council of the Churches of Christ in the United States of America), Tables 1-A and 1-B at pp. 217-224.

These are times in which clergymen and other religiously-committed citizens are acting upon their perception that they have a conscientious commitment to involve themselves constructively with the needs and aspirations of their fellow citizens who are culturally, socially and economically disadvantaged. As a result of their contacts with persons engaged, or alleged to be engaged, in criminal activities and with those accused of crimes, the convicted and the imprisoned, clergymen are with increasing frequency being called to testify as witnesses before grand juries, Federal and State, in all jurisdictions of the nation. They, and their brothers and sisters in religion, and the people whose religious needs they are serving, badly need a definitive statement by this Court about the nature and scope of the protection, if any, afforded by the Free Exercise Clause to a clergyman in a case such as this.

III. In this case of first impression, the New York court's restrictive interpretation of the Free Exercise Clause should not be allowed to stand

In rejecting the Petitioner's claim that his First Amendment rights entitled him to judicial protection in the form of a balancing test, the New York Court of Appeals reasoned:

> "On the record before us, appellant raises no colorable First Amendment right. His right to practice his ministry cannot serve to shield him from shedding light upon whether or not any unlawful efforts were undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance into work release programs or to obtain a transfer to less secure institutions. In so holding, we observe that the statutory privilege (CPLR 4505) affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute. (Cf. *Branzburg* v. *Hayes,* 408 US 665, *supra.*) Absent a showing that the conversations sought to be disclosed are embraced by the priest-penitent privilege, appellant, even though a clergyman, is, like all citizens, obligated to respond to those questions relevant to the Grand Jury's investigation."

We submit that the New York Court's opinion misconstrued the relationship between the Free Exercise Clause and the statutory priest-penitent privilege. The court in effect said that a clergyman's testimonial rights under the First Amendment were one and the same as, and not broader than, the priest-penitent privilege. The Court's

error seems evident from a mere reading of the New York statute:

> "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor." (New York Civil Practice Law and Rules § 4505)

From the language of the statute it is clear that the priest-penitent privilege in New York, as in the statutes of other States, is not a privilege of the clergyman at all; it is solely the privilege of the "person confessing or confiding". That person alone can invoke it and that person alone can waive it.

The New York Court's holding amounts, moreover, to a declaration that in all cases, regardless of the circumstances, the investigatory rights of a grand jury are so sweeping that, except for priest-penitent communications, the acts of a clergyman in the exercise of his ministry are not entitled to constitutional recognition, not even to the extent of being entitled to judicial protection on a case-to-case basis. The result is to give First Amendment weight only to one part of a clergyman's religious ministry and deny it to the rest, thereby drawing a line between what part of a religious ministry is constitutionally recognizable and what part is not. The drawing of that line ignores the fact that in the doctrine of the Roman Catholic Church, mirrored in the doctrines of other denominations, the essence of religious ministry extends far beyond priest-penitent communications. A Catholic priest, for example, has, as part of his sacred ministry an obligation to "instruct the spiritually ignorant, to console the sick, to strengthen the wavering, to pacify the quarrelsome, to counsel the spiritually doubtful, to support the tempted

and discouraged, to assist the dying . . .". (Rev. Robert E. Regan, O.S.A., S.T.L., *The Moral Principles Governing Professional Secrecy with an Inquiry into Some of the More Important Professional Secrets,* Studies in Sacred Theology No. 60 (The Catholic University of America, Washington, D.C. 1941), at page 172. Indeed, this Court has already observed in a case involving the First Amendment rights of an ordained minister that his right to the free exercise of religion "unquestionably encompasses the right to preach, proselytize and perform other similar religious functions . . .". *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978).

Then, too, the New York court's oversimplification of the issue of free exercise of religion passes over the serious problem of conscience that confronts a clergyman called upon to testify about ministerial acts that are outside the ambit of the priest-penitent privilege. In the doctrine of the Roman Catholic Church, for example, there are what are known as extra-sacramental secrets:

> "The extra-sacramental secret denotes the obligation of secrecy incumbent on the priest with reference to those confidences entrusted to him precisely in view of his sacred priestly character (but entirely apart from the sacrament of Penance) for the purpose of obtaining some service which by reason of his sacred ministry he is prepared to give." (Rev. Robert E. Regan, *op. cit.* at pp. 171-172)

IV. There is a need for this Court to define the extent, if any, to which its decision in *Branzburg* applies to Free Exercise cases

The New York court interpreted this Court's widely cited and discussed holding in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), as if it had direct application to the testimonial rights of a clergyman when appearing before a

grand jury. In so doing, it rejected arguments pointing out constitutionally significant distinctions between clergymen and newsmen and between the free exercise of religion and the First Amendment guaranty of freedom of the press.

The New York Court of Appeals cited *Branzburg* as the sole authority for the essence of what it decided in this case. Moreover, it affirmed a decision of New York's Appellate Division that had held:

> "Although confronted with a freedom of the press issue, the Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnessses is the Fifth Amendment right against compulsory self-incrimination. (At pp. 689-690.)"

This *amicus curiae* submits that there are such important distinctions between the kind of testimonial rights in this case and the kind in *Branzburg* that this Court would conclude that, as between them, there is a constitutional dichotomy. Two of those important distinctions are these:

> (a) In *Branzburg* the newsmen argued that forced grand jury disclosures would *damage* the ability of the press to gather news and thus *ultimately* affect the constitutionally protected rights of the press to report news. In that vein, this Court's opinion referred to "the consequential, but uncertain burden on news gathering". [page 690] On the other hand, to compel a clergyman to testify about acts performed in the practice of his ministry would not be a mere "uncertain burden" on his activities but a direct invasion of his religious freedom, a point-blank breach of his solemn, religiously-based responsibility of maintaining confidentiality.

(b) The historical, societal, factual and jurisprudential differences between the freedom of press and freedom of religion clauses are constitutionally significant and sufficient, therefore, to warrant a different rule with respect to the testimonial rights of clergymen.

As we read this Court's opinions in *Branzburg,* not a single word was said about the testimonial rights of clergymen, about the priest-penitent privilege, or even about the Free Exercise Clause of the First Amendment. There was, moreover, nothing in those opinions that would necessarily support an analogy between the testimonial rights of newsmen and the testimonial rights of clergymen exercising their ministry. It may be that this Court will on some occasion, perhaps even in this case, choose to draw such an analogy, but we respectfully submit that it has not yet done so and there was no sound basis for the New York court to infer that it had.

This Court has repeatedly said that the free exercise of one's religion is such a precious constitutional liberty that the judiciary is required to give special consideration to the sensitive task of weighing governmental interests when faced with a threatened infringement on that First Amendment right. *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 403, 406, 407 (1963); and *Wisconsin* v. *Yoder,* 406 U.S. 205, 214, 215, 220, 235 (1972).

V. This case could be the occasion for an illustration of the application of a "balancing test"

The New York courts rejected Petitioner's contention that a "balancing test" should be applied before he was directed, under threat of imprisonment, to testify about his ministerial acts. This Court's holding in *Branzburg* was read as dispensing with a constitutional requirement

for such a test, regardless of the circumstances, because of the absolute and unqualified predominance of the testimonial demands of a grand jury.

This *amicus curiae* believes that, to the contrary, there are clear indications in the majority opinion in *Branzburg* that, even as to newsmen, a "balancing test" is constitutionally indicated under certain circumstances, e.g., at pages 686, 690 and 700, of that opinion. In any event, the appropriateness of such a test is clearly stated in the concurring opinion of Mr. Justice Powell at page 710:

> "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

The facts of record in this case virtually cry out for a careful weighing of Petitioner's First Amendment rights against the testimonial needs of the New York grand jury. The record shows that the Trial Court found:

(a) That what the Petitioner did in visiting the prisoner and speaking to officials of the Department of Correction on the prisoner's behalf was suitable to the ministry (21a).*

(b) That the Petitioner was not a target of the criminal investigation (17a).

(c) That there was no indication of any knowledge on the part of the Petitioner of improper activities (18a).

---

* Numbers in parentheses refer to pages of the Petitioner's appendix.

(d) That there was no indication that the Petitioner had done anything that was criminal or culpable (19a).

(e) That there was no evidence that the Petitioner was aware of anything illegal occurring (20a).

(f) That there was no indication that the Petitioner had significant evidence of criminal activities which was important for the grand jury to have (21a).

(g) That the prosecutor already had on tape and in written transcripts the information about which the Petitioner was being questioned (16a).

(h) That there were alternative sources of information available to the grand jury (16a).

(i) That the application of a balancing test would show no compelling need for the Petitioner's testimony (20a-21a).

The *amicus curiae* submits that this case presents an ideal example of the need for the application of a "balancing test" when a clergyman's right to the practice of his religious ministry clashes with the demands of a grand jury.

Conclusion

The *amicus curiae* asks, therefore, that this Court grant the petition for a writ of certiorari to the New York Court of Appeals.

Respectfully submitted,

LAWRENCE X. CUSACK
JOSEPH E. MOUKAD
Attorneys for Roman Catholic Archdiocese of New York, Amicus Curiae
61 Broadway
New York, N.Y. 10006

August 10, 1979.